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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 74-966

AMERICAN FOREIGN STEAMSHIP COMPANY, a Corporation,
Petitioner,

vs.

LILLIAN M. MATISE, as personal representative of
GRANVILLE C. MATISE, deceased, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Subject Index

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statutory provisions involved	3
Statement of the case	4
Reasons for granting the writ	7
1. The decision of the court of appeals below is in conflict with applicable decisions of this court	7
2. The decision of the court of appeals below is in direct conflict with the decisions of other courts of appeals on a substantial question of federal maritime law	9
3. The decision below presents an important statutory issue of first impression	11
Conclusion	12

Table of Authorities Cited

Cases	Pages
Caribbean Federation Lines v. Dahl, 315 F.2d 370 (1973)	9
Chambers v. Moore-McCormack Lines, 182 F.2d 747 (3d Cir. 1950)	8
Collie v. Fergusson, 281 U.S. 55 (1930)	7, 9
Escobar v. SS Washington Trader, 503 F.2d 271 (9th Cir. 1974)	6, 10
Forster v. Oro Navigation Co., 228 F.2d 319 (1955)	9
Isbrandtsen Co. v. Johnson, 343 U.S. 779 (1952)	5, 7
Mavromatis v. United Greek Shipowners Corp., 179 F.2d 310 (1950)	9
McConville v. Florida Towing Corp., 321 F.2d 162 (5th Cir. 1963)	8
McCrea v. United States, 294 U.S. 23 (1936)	7
Mystic SS Co. v. Stromland, 21 F.2d 607 (1927)	9
Pacific Mail S.S. Co. v. Schmidt, 241 U.S. 245 (1916)	9
Prindes v. The SS African Pilgrim, 266 F.2d 125 (1959)	9
Southern Cross SS Co. v. Firipis, 285 F.2d 651 (1960)	9
Swain v. Isthmian Lines, Inc., 360 F.2d 81 (3d Cir. 1966)	10, 11

Statutes

28 U.S.C.:	
Section 1254(1)	2
46 U.S.C.:	
Section 596	2, 3, 4, 7, 9, 10, 11, 12

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PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

Petitioner, American Foreign Steamship Company, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on September 27, 1974.

OPINIONS BELOW

The initial opinion of the United States District Court for the Northern District of California, unreported, appears in the Appendix at p. i. The initial opinion of the United States Court of Appeals for the Ninth Circuit is reported at 488 F.2d 471, and appears in the Appendix hereto at p. iv. The judgment of the United States District Court for the Northern District of California without opinion appears in the Appendix at p. xv. The order and judgment of the United States Court of Appeals for the Ninth Circuit, unreported and without opinion, appear in the Appendix at p. xvii. The order denying the petition for rehearing is included in the Appendix at p. xviii.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on September 27, 1974. A timely petition for rehearing en banc was denied on November 7, 1974, and this petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether it is error to impose the double-wage penalties under 46 U.S.C. §596 without a hearing on the merits as to the existence of "sufficient cause".

2. Whether in the absence of a finding of arbitrary, unreasonable and willful conduct by the shipowner the

double-wage penalties under 46 U.S.C. §596 can be imposed.

3. Whether the judiciary has discretion in assessing the amount of a penalty under 46 U.S.C. §596.

STATUTORY PROVISIONS INVOLVED

46 U.S.C., §596 TIME FOR PAYMENT:

"The Master or Owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after termination of the agreement under which he was shipped, or at the time said seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every Master or Owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the Court; but this section shall not apply to Masters or Owners of any vessel, the seamen of which are entitled to share in the profits of the cruise or voyage. This section shall not apply to fishing or whaling vessels or yachts."

STATEMENT OF THE CASE

This suit was instituted by Respondent 's decedent (hereinafter Respondent) in the United States District Court for the Northern District of California against Petitioner seeking (a) recovery of Five Hundred and Ten Dollars ($510.00) alleged to have been illegally deducted by Petitioner from his earned wages, and (b) imposition and recovery of the double-wage penalty allowed to seamen for wages withheld without sufficient cause under 46 U.S.C. §596. The basic facts, which are not in dispute, are as follows:

The Respondent was employed as an oiler for a foreign voyage aboard the SS AMERICAN HAWK, owned by Petitioner, and was discharged for good cause on March 19, 1969 in Saigon, South Vietnam, in the presence of the vessel's Master, the United States Vice Consul and two United Coast Guard officials by reason of Respondent's willful misconduct and neglect of duty. The vessel's Master was advised by the Vice Consul and Coast Guard officials that he was not required to pay the cost of Respondent's return transportation to the United States since his discharge was for good cause. Currency control regulations then prevailing in the Republic of South Vietnam prohibited American Merchant seamen from carrying United States currency ashore and further required that the vessel's safe containing currency be sealed. Thus, the Respondent could not be paid his earned wages and put ashore. Furthermore, an airline ticket for return transportation to the United States from Saigon could at that time only be purchased with United States currency. With the approval of the Vice Consul, the vessel's Master was granted permission by Customs authorities of the Republic of South Vietnam to break the seal on the vessel's safe and withdraw the precise amount necessary to purchase an airline ticket to the United States, Five Hundred and Ten Dollars ($510.00). With the approval of the Vice Consul, the two Coast Guard officials, and the Respondent, the vessel's Master purchased an airline ticket on behalf of Respondent. A wage voucher was provided by the Master to the Respondent which deducted from the amount of Respondent's earned wages the cost of the airline ticket.

On December 15, 1971 following trial to the Court, the United States District Court for the Northern District of California entered judgment in favor of Petitioner. As is apparent from the District Court's Opinion, the Respondent was found to have received all funds to which he was entitled and the trial court concluded that there was no illegal withholding or illegal deduction from Respondent's earned wages. No ruling was made on the question of sufficient cause or assessment of the double-wage penalties.

On appeal by Respondent, the United States Court of Appeals for the Ninth Circuit reversed the District Court judgment in favor of Petitioner. The Court of Appeals held, largely on the basis of *Isbrandtsen Co. v. Johnson,* 343 U.S. 779 (1952), that there had been an illegal deduction from Respondent's earned wages in the amount of Five Hundred and Ten Dollars ($510.00). The Court of Appeals went on in its Opinion to consider in part the question of sufficient cause, although never touched upon by the trial court, and held that Petitioner could

not rely upon the Respondent's execution of a mutual release nor on the applicable law which did not require Petitioner to bear the expense of Respondent's return transportation to the United States in claiming the existence of sufficient cause. The Court of Appeals however did not expressly hold that the deduction was without sufficient cause and that Petitioner was liable for a double-wage penalty.

On remand to the District Court and following briefing and oral argument, judgment was entered in favor of Respondent in the sum of Thirty-Five Thousand, Three Hundred Six Dollars and Twenty Seven Cents ($35,306.27) which amount included an award of the double-wage penalty for the period commencing March 24, 1969 through and including December 15, 1971, the date upon which judgment was initially entered in favor of Respondent.

Intervening the initial opinion of the Court of Appeals and the subsequent entry of judgment by the District Court in favor of Respondent, the Court of Appeals below rendered its decision in *Escobar v. SS Washington Trader,* officially reported at 503 F.2d 271 (9th Cir. 1974), and appearing in the Appendix at p. xix. The Petitioner filed timely notice of appeal from the Trial Court's entry of judgment in favor of Respondent, which following Respondent's motion for an expedited decision, opposed by Petitioner, was affirmed by the Court of Appeals. Although not citing its opinion in *Escobar, supra,* the affirmance by the Court of Appeals as to the amount of the penalty was in accord with its decision in that case. The Petitioner's request for a rehearing *en banc,* timely

filed on October 11, 1974, was denied by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE COURT OF APPEALS BELOW IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The decisions of this Court in *Isbrandtsen Co. v. Johnson,* 343 U.S. 779 (1952); *Collie v. Fergusson,* 281 U.S. 55 (1930), and *McCrea v. United States,* 294 U.S. 23 (1936) hold, in part, that the penalty provision of 46 U.S.C. §596 is applicable and liability for double wages accrues, if at all, only upon a finding that a refusal or neglect to pay was without sufficient cause. In *Collie v. Fergusson,* this Court concluded that a finding as to the absence of sufficient cause was a condition prerequisite to the accrual of the penalty. 281 U.S. at p. 55. In *McCrea v. United States,* this Court expressly held that liability for double wages necessarily requires a determination of whether or not the failure to pay wages within the prescribed period was without sufficient cause. 294 U.S. at p. 29. In *Isbrandtsen Co. v. Johnson,* this Court affirmed the lower Court's disallowance of the seaman's claim for double wages, citing in support thereof its earlier decision in *Collie v. Fergusson.* The Court of Appeals for the Third Circuit in *Isbrandtsen Co. v. Johnson,* held that the mere existence of an unlawful withholding does not, in and of itself, establish the absence of sufficient cause for that withholding. 190 F.2d at p. 993.

The above-mentioned decisions of this Court clearly establishing that the imposition of double-wage penalties

requires a legal-factual finding as to the absence of sufficient cause for the withholding or deduction have been followed by numerous lower Court decisions. See *Chambers v. Moore-McCormack Lines,* 182 F.2d 747, 749 (3d Cir., 1950) and *McConville v. Florida Towing Corp.,* 321 F.2d 162, 168 (5th Cir., 1963). Under the decision of the Court of Appeals below, the mere finding of an illegal deduction or unlawful withholding from the seaman's earned wages would result in the automatic imposition of the double-wage penalty. It is patently clear that the District Court did not consider the legal-factual question of sufficient cause. The Court of Appeals below, after correcting their misapprehension as to the District Court's findings by amending their opinion (Appendix, p. iv, to delete the earlier error citing the District Court as finding an absence of sufficient cause even had the deduction been unlawful, perpetuated their misunderstanding of the trial court's findings, and allowed the remainder of their opinion to stand in which it ruled that the Petitioner could not rely on Respondent's execution of a mutual release nor the general maritime law which did not obligate Petitioner to bear the expense of Respondent's return transportation, in claiming the existence of sufficient cause. Thusly, neither the District Court nor the Court of Appeals made the required legal-factual determination as to the existence or absence of sufficient cause.

As earlier declared by this Court, the phrase "without sufficient cause" means conduct which is in some sense arbitrary, unreasonable or willful and liability for double wages will not be incurred where the refusal or neglect to pay was in some reasonable degree morally justified.

Collie v. Fergusson, 281 U.S. 51 (1930). The judgment of the Court of Appeals below includes an award of double wages under Section 596 without any finding of arbitrary or unreasonable conduct by the petitioner and without any consideration of the equities supporting petitioner's conduct. This is contrary to the standards of liability for Section 596 penalties established by this Court in earlier decisions.

The conflict between the decision of the Court of Appeals below and the earlier decisions of this Court justifies the grant of certiorari to review the judgment below.

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2. THE DECISION OF THE COURT OF APPEALS BELOW IS IN DIRECT CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON A SUBSTANTIAL QUESTION OF FEDERAL MARITIME LAW.

The decision below which applies an unalterable mathematical computation of penalties which does not take into consideration the degree, if any, that the shipowner's actions may or may not have been arbitrary, willful or unreasonable and which denies any discretion to the trial court to assess the penalties provided for in 46 U.S.C. §596 in light of the equities of the case is in direct conflict with the decisions of the Court of Appeals for the Fourth Circuit in *Southern Cross SS Co. v. Firipis,* 285 F.2d 651 (1960); *Prindes v. The SS African Pilgrim,* 266 F.2d 125 (1959), and *Mystic SS Co. v. Stromland,* 21 F.2d 607 (1927); the Court of Appeals for the First Circuit in *Mavromatis v. United Greek Shipowners Corp.,* 179 F.2d 310 (1950); the Court of Appeals for the

Fifth Circuit in *Caribbean Federation Lines v. Dahl,* 315 F.2d 370 (1973) and the Court of Appeals for the Second Circuit in *Forster v. Oro Navigation Co.,* 228 F.2d 319 (1955).

In each of the above cited cases the Courts of Appeals held that in assessing the amount of the Section 596 penalty the judiciary was vested with an inherent discretion to adjust or mitigate the amount of the penalty to conform to the equities of the particular case. By exercising such discretion, the imposition of an otherwise unjustifiably harsh result was avoided or an unconscionable taking by the seaman was prevented. Authority to consider the equities of the particular case in assessing the amount of a Section 596 penalty was found by these Courts of Appeals in this Court's ruling in *Pacific Mail S.S. Co. v. Schmidt,* 241 U.S. 245 (1916) and at times has appeared to be claimed as a rule of law which prevented a legislative policy intended to preclude overreaching of the seaman from becoming a sword to achieve overreaching by the seaman.

The decision of the Court of Appeals below, following its earlier decision in *Escobar,* clearly evidences an adoption of the views of the Court of Appeals for the Third Circuit in *Swain v. Isthmian Lines, Inc.,* 360 F.2d 81 (3rd Cir. 1966) wherein it was held that the language of Section 596 presented an unequivocal and mandatory command to the judiciary to impose the full double-wage penalty without adjustment and without regard to the equities of the case. In *Swain,* the Court of Appeals for the Third Circuit concluded that those decisions which upheld the principle of discretion to adjust or

mitigate the penalty were erroneous, and that consideration of the equities of the case and resultant exercise of discretion by the Court was proper only in determining whether or not the withholding was "without sufficient cause" thereby justifying the imposition of penalties. Parenthetically, Petitioner respectfully submits that if the Court of Appeals below intended to follow the precise reasoning of the Court of Appeals for the Third Circuit in *Swain, supra,* there should have been a consideration of the equities in the instant case in determining whether the double-wage penalty was in order at all.

The direct conflict between the decision below and decisions of the other Courts of Appeals on the same question justifies the grant of certiorari to review the judgment below.

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3. THE DECISION BELOW PRESENTS AN IMPORTANT STATUTORY ISSUE OF FIRST IMPRESSION

The precise question whether a Court has discretion to adjust the amount of a double-wage penalty under Section 596 has never been decided by this Court. The question is not merely academic and is a matter of grave concern. An ultimate determination on the question of the legality of a disputed withholding or deduction from a seaman's earned wages adverse to a shipowner could, under the decision below, result in the mechanistic imposition of a penalty in a sum grossly disproportionate to the earned wages in dispute. The conflicting interpretations of 46 U.S.C. §596 have left confused the intent and meaning of that statute. Under the present

state of the law, the amount of a Section 596 penalty could depend upon the forum chosen by the seaman. The precise question of how to measure the statutory penalty once an absence of sufficient cause is properly determined is a novel and substantial point of law for this Court, and justifies the grant of certiorari.

CONCLUSION

For these reasons, it is respectfully submitted that a Writ of Certiorari should issue to review the judgment of the Court of Appeals for the Ninth Circuit.

Dated, February 3, 1975.

Respectfully submitted,

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JOHN A. FLYNN
FRANCIS L. TETREAULT
Counsel for Petitioner

(Appendix Follows)

[redacted]

Appendix

The United States District Court
Northern District Of California

Before: Hon. Robert H. Schnacke, Judge

No. C-70 538 RHS

Granville C. Matise,
Plaintiff,

vs.

American Foreign Steamship Corporation, et al.,
Defendants.

REPORTER'S PARTIAL TRANSCRIPT
December 10, 1971

Appearances:
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San Francisco 94104

For Defendants:
Graham & James
Attorneys at Law
By: John A. Flynn, Esquire
310 Sansome Street
San Francisco 94104

December 10, 1971

THE COURT: All right, gentlemen. I thank you for your argument.

None of the cases cited by the plaintiff seem to be precisely the case that we have here, and none of them caused me to change my view on the state of the law.

It is perfectly plain that in any disputed matter, as between the shipowner or the master of the ship and the seaman, the master clearly may not resolve the dispute in his own favor by taking a deduction that is in any way subject to review or consideration. But that doesn't mean that a seaman is totally incapable of directing the application of his own funds, and from the evidence that's before me I must find that that is what happened in this case: that the seaman here, who was at all times significant herein, a member of the vessel AMERICAN HAWK, was a citizen of the United States, signed on at Long Beach January 10, 1969, and who was discharged for willful misconduct and neglect of duty in Saigon on March 19, 1969, was properly discharged for good and lawful cause.

From the evidence it's undisputed that the obligation to repatriate the plaintiff was not upon the shipowner, but was rather the personal responsibility of the seaman.

By reason of regulations of the Army and the government of South Vietnam at the time of the discharge, it was impossible to permit the transfer of money to the seaman to permit him to go ashore to buy his own ticket. The currency regulations of South Vietnam had required the sealing of the safe of the AMERICAN HAWK; and under the circumstances in Saigon at the time, airline tickets could be purchased only with United States currency.

The plaintiff consented to and approved the purchase of an airline ticket for his purposes with his money under circumstances that were arranged by the master

and the vice consul with the special permission of the South Vietnamese customs officials. The purchase of that ticket under those circumstances constituted the equivalent of payment of monies over to the seaman.

The release that he later signed in signing off the articles and in accepting the pay voucher and in the later release, which is Exhibit G, don't constitute a waiver of claim in any fashion, and they weren't received in evidence for that purpose, but they do indicate that this was not and never has been a disputed item in any way. They are evidence of the consent and approval of the plaintiff of the payment to him in this fashion. Accordingly, his having been paid everything that he was entitled to be paid obviously precludes his being successful in an action of this sort.

So it is the conclusion of the Court that this Court has jurisdiction under the General Maritime Law; the plaintiff was lawfully and properly discharged for cause by reason of his own willful misconduct and neglect of duty; that there was no unlawful withholding by the defendant of the sum of $510.00 or any other amount; and that since there was no unlawful withholding or illegal deduction from plaintiff's earned wages, there are no grounds for recovery of the double-wage penalty.

Accordingly, the defendant is entitled to judgment in this action with costs.

The transcription of my remarks here will constitute the Court's findings of fact and conclusions of law for all purposes of the case.

United States Court of Appeals
Ninth Circuit

No. 72-1345

Lillian M. Matise, as personal representative of Granville C. Matise, Deceased, Appellant

vs.

American Foreign Steamship Co., Appellee

March 8, 1974

As Amended on Denial of Rehearing

April 4, 1974

Before MERRILL and ELY, Circuit Judges, and EAST,* District Judge.

OPINION

ELY, Circuit Judge:

This appeal arises from a suit brought by Granville C. Matise,[1] a seaman, against American Foreign Steamship Corporation, in which Matise alleged that $510.00 of his earned wages had been unlawfully withheld from him. He sought the recovery of these wages and claimed

*Honorable William G. East, Senior United States District Judge, District of Oregon, sitting by designation.

[1]Matise died during the pendency of his suit. The State of Maryland appointed Lillian M. Matise as his Personal Representative, and, pursuant to stipulation, the District Court substituted her as the plaintiff in the action.

the dougle wage penalty allowed to seamen for wages withheld without sufficient cause.[2] The District Court, in a trial without jury, found that there was no unlawful withholding and entered judgment for the shipowner. We reverse.

Briefly, the facts of the case are these: Matise signed articles of employment as an oiler for a foreign voyage aboard the S.S. American Hawk, appellee's vessel, on January 11, 1969 in Long Beach, California. He was discharged for good cause on March 19, 1969 in Saigon, South Vietnam, in the presence of the ship's captain, the United States Vice Consul, and two United States Coast Guard officials. The captain was advised by the Vice Consul and Coast Guard officials that the shipowner did not have a duty to pay the cost of transportation to repatriate Matise, since his discharge was for good cause. These officials were not acting within their official authority in so advising the ship's captain. The shipowner was obliged by treaty and by the laws of the government of South Vietnam to remove all persons brought to South Vietnam by the ship. At that time, however, South Vietnam prohibited American seamen from carrying United States currency ashore and required that

[2]46 U.S.C. § 596 reads, in pertinent part:

"The master or owner of any vessel [making foreign voyages] . . . shall pay to every seaman his wages . . . within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens . . . Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court. . . ."

the ship's safe containing currency be sealed. Thus, Matise could not simply be paid the wages that were due him and put ashore. Furthermore, an airline ticket for transportation to the United States from Saigon could only be purchased with United States currency. With the approval of the Vice Consul, the ship's captain was granted permission by South Vietnamese Customs to break the seal on the vessel's safe and withdraw the amount necessary to purchase an airline ticket to the United States, $510.00. The ship's captain then purchased, or arranged for his agent to purchase, the ticket, which was given to Matise. In the presence of the Vice Consul, the two Coast Guard officials, and the ship's captain, Matise was given a Wage Voucher signed by the captain in the amount of $118.45. The cost of the airline ticket had been deducted from the full amount of wages due Matise, and $118.45 was the remainder. While there is some dispute as to whether or not the seaman signed the Wage Voucher while in Saigon, the Voucher indicates on its face that it was signed by Matise in San Francisco. After arriving in the United States, Matise was signed off the ship's articles by the U.S. Shipping Commissioner in San Francisco. The Commissioner required Matise to sign a release as a condition to the latter's receiving any part of his wages. Matise took the release and the Wage Voucher as prepared by the captain to the shipowner, which in turn required Matise to sign the Voucher in order to receive any of his wages. On these facts, the District Court found that the $510.00 used to purchase the airline ticket to repatriate Matise was a partial payment of wages and that there was therefore no unlawful withholding.

Here, the questions are: (1) Was there an unlawful withholding of Matise's wages? (2) If so, was the unlawful withholding without sufficient cause?

As a general principle of maritime law, when a seaman is discharged for good cause in a foreign port, the seaman's misconduct is, in effect, a breach of the seaman's contract with the ship and terminates the shipowner's obligation to bring the seaman home. Norris, The Law of Seamen (3rd Ed.) Vol. 1, Section 420 (1970); Ward v. United States, 66 F.Supp. 237 (D.C. 1946). Furthermore, by statute, the wages of a seaman on a foreign voyage become due and payable within twenty-four hours after the cargo has been discharged or within four days after the seaman has been discharged, whichever first occurs. 46 U.S.C. §596. Failure to pay the seaman within the statutory time limit, without sufficient cause, subjects the shipowner to double wage penalties. 46 U.S.C. §596.

The appellee argues that since maritime common law only requires a shipowner to pay wages to a seaman discharged for cause, the ship's captain effectively paid Matise part of his wages by buying him a ticket home. The appellee's argument cannot stand in view of the far-reaching protection of seamen's wages which is now provided by statute. As the Supreme Court said in Isbrandtsen v. Johnson, 343 U.S. 779, 784, 72 S.Ct. 1011, 1015, 96 L.Ed. 1294 (1952):

"Congressional legislation now touches nearly every phase of a seaman's life . . . . It deals specifically with his shipping articles and the payment to him of his wages . . . . It insures the payment to him of the balance of [his] wages upon completion of his voyage or shortly

after discharge. It deals explicitly with the final payment of wages."

The shipowner in this case did not pay part of Matise's final wages in Saigon, as it argues, since the $510.00 was not paid to Matise but to an airline. Although the appellee contends that the transportation money spent on Matise's alleged behalf is equivalent to the payment of wages to Matise, the applicable statutes explicitly and unequivocally provide that the wages due are to be paid *to the seaman,* 46 U.S.C. §§ 596-597. Furthermore, the shipowner here was acting to some extent in its own behalf, in view of its legal obligation to remove all persons, including a discharged seaman such as Matise, whom it had transported to South Vietnam. Even, however, had the money been spent entirely for the benefit of Matise, it could not be treated as a partial payment of his wages and thereby deducted from the total amount of wages that he had earned and to which he was entitled. In Gonzales v. Isthmian Steamship Co., 1958 A.M.C. 97 (E.D.Pa. 1957), the shipowner paid for a lawyer and incurred related expenses for the benefit of a seaman held in jail on charges of assault. Although the seaman had signed an agreement with the ship allowing the expenditures to be paid as an advance on his wages, the District Court refused to allow the shipowner to deduct the amount of the expenses from the seaman's wages. The Court said: ". . . except as expressly provided by law, a seaman cannot give up any right to wages, or any remedy for the recovery of wages, even by agreement." 1958 A.M.C. at 105. In so writing, the court followed the rule of Isbrandtsen v. Johnson, *supra,* which

held that only those specific deductions and set-offs designated by statute could be withheld from a seaman's wages. In *Isbrandtson* the Supreme Court held that regardless of the validity of the shipowner's claim against the seaman, the shipowner may not withhold the seaman's wages to satisfy those claims. The Supreme Court wrote:

"Congress has gone so far in expressly listing such deductions and set-offs that it is a fair inference that those not listed may not be made. It thus remains for the courts to determine only what are the deductions or set-offs for derelictions of duty that are listed by Congress, rather than to determine which of the deductions or set-offs once known to the general maritime law Congress has failed to exclude. Congress, in effect, has excluded all of them except those which it has listed affirmatively." 343 U.S. at 789, 72 S.Ct. at 1017.

The statutory scheme enacted by Congress does not provide for set-offs or deductions for return transportation expenses, and *Isbrandtsen* has been applied to bar the deduction of repatriation costs from a seaman's wages. In Schwark v. S.S. Rio Macareo, 249 F.Supp. 375 (E.D. La. 1966), a seaman was discharged for good cause in a foreign port, just as was Matise in our case. An agreement in the articles of the ship provided that the ship was not obligated to pay the cost of repatriating any crewmember discharged for cause. Nevertheless, the court held that as a matter of law, the ship could not offset the cost of repatriating the seaman against his wages, even though the court found that the ship had a valid claim against the seaman for that amount. *See also* Swain

v. Isthmian Lines, Inc., 360 F.2d 81 (3d Cir. 1966), wherein the shipowner was required to restore wages and pay a double wage penalty for withholding from a seaman's wages the cost of medical treatment paid by the ship, a cost for which the seaman was admittedly liable; Keen v. United States, 199 F.2d 151 (2d Cir. 1952), wherein a shipowner who had deducted from a seaman's wages the cost of medical treatments and transportation to the United States was assessed double penalty wages; Shilman v. United States of America Shipping Administration, 164 F.2d 649 (2d Cir. 1947), cert. denied, 333 U.S. 837, 68 S.Ct. 608, 92 L.Ed. 1122 (1948), wherein the Second Circuit held that a seaman discharged in a foreign port is entitled to receive all his earned wages, without any deductions whatsoever except those specifically authorized by statute; Ventiadis v. C. J. Thibodeaux & Co., 295 F.Supp. 135 (S.D.Tex. 1968), wherein it was held that although a seaman had signed a release, left the ship at his own request, and was flown at company expense to his home port in Greece, he was nevertheless entitled to double penalty wages for the repatriation costs deducted from his wages.

The foregoing authorities make it clear that the shipowner, in deducting transportation costs from Matise's wages, unlawfully withheld those wages within the meaning of 46 U.S.C. § 596. Furthermore, the case law has, for at least two decades, provided full notice to shipowners seeking to avoid the imposition of double wage penalties that only those deductions from wages that are allowed by statute are lawful. As the court remarked in Swain v. Isthmian Lines, Inc., *supra:*

"It has been eminently clear in the law, at the very least since the Supreme Court case of Isbrandtsen Co. v. Johnson in 1952 that a deduction from wages for medical expenses such as were incurred by appellee in the instant case is wrongful as falling outside the proper deductible instances . . . . This question, therefore has been closed for some time." 360 F.2d, at 83 (footnote omitted).

It is therefore clear that the shipowner in our case cannot claim that it had "sufficient cause" to withhold a portion of Matise's wages because of reliance on the general maritime law which did not require a shipowner to pay the cost of repatriating a seaman discharged for good cause. As we have previously indicated, this argument has been without merit since the Supreme Court decided Isbrandtsen v. Johnson, *supra,* over twenty years ago.

The only remaining question is whether the shipowner can avoid double wage penalties because Matise signed the Wage Voucher and mutual release before the shipping commissioner. Where, as here, a seaman has been compelled to sign a release and Wage Voucher in order to receive wages which the shipowner admits are due, the release has been set aside by the courts as having been executed under duress. In Prindes v. S.S. African Pilgrim, 266 F.2d 125 (4th Cir. 1959), a seaman was logged two days' pay for failing to return to his ship one hour before the posted sailing time as his contract required. At the termination of the voyage the seaman was offered his earned wages minus the logged pay, but before he could receive *any payment* he was required by

the ship to sign a Wage Voucher and a mutual release. The court, in holding that the Wage Voucher and release were invalid, declared: "It is well settled that a seaman is entitled to double wages or 'waiting time' under 46 U.S.C.A. § 596, if wages concededly due are tendered only upon condition that he will release disputed claims." 266 F.2d at 127. And in Isthmian Lines, Inc. v. Haire, 334 F.2d 521 (5th Cir. 1964), the shipowner contended that the seaman's right to maintenance and cure monies was foreclosed because of a mutual release that the seaman had executed before the shipping commissioner when his earned wages were paid. The Fifth Circuit, in affirming the District Court's judgment in favor of the seaman emphasized:

"The Shipping Commissioner is no roving arbiter of all of the disputes between ship and seaman. He is given no power to resolve unliquidated demands for cure, for maintenance . . . . Moreover, as a principle of ordinary law—land-locked, seagoing, or amphibious—a release for payments for amounts admittedly due lacks consideration." 334 F.2d at 523. *See* 46 U.S.C. § 597, which provides that any court having jurisdiction may on good cause shown set aside a release signed before a shipping commissioner and take such action as justice may require. *See also* Garrett v. Moore-McCormack Co., 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 239 (1942), and Pacific Mail S.S. Co. v. Lucas, 258 U.S. 266, 42 S.Ct. 308, 66 L.Ed. 614 (1922).

Matise was misinformed in Saigon by the Vice-Consul, the two Coast Guard officers, and his captain by their representations to him that he could "be forced to spend

his own money to send him back home." Furthermore, he was compelled to sign the release and Wage Voucher in order to receive the remainder of his wages that admittedly were due. In these circumstances, we hold that neither the Wage Voucher nor the release can in any manner be treated as a waiver by Matise of his claim or a factor tending to show that the shipowner had "sufficient cause" to withhold a part of Matise's wages.

Reversed.

United States Court of Appeals
For The Ninth Circuit

No. 72-1345

Lillian M. Matise, as personal representative of Granville C. Matise, deceased,
Appellant,
vs.
American Foreign Steamship Co.,
Appellee.

[Filed April 4, 1974]

On Petition For Rehearing

ORDER

Before: MERRILL and ELY, Circuit Judges, and EAST, District Judge.*

The court amends its opinion in the subject cause by deleting the last sentence of the first incomplete paragraph on page 3 of the slip opinion dated March 8, 1974. The sentence, now deleted, read: "The District Court further found that even had there been an unlawful withholding, it was not without sufficient cause within the meaning of 46 U.S.C. § 596." The court's opinion having been amended as above specified, the Petition for Rehearing is DENIED.

*Honorable William G. East, Senior United States District Judge, District of Oregon, sitting by designation.

In The United States District Court
For The Northern District Of California

No. C-70 538 RHS

Lillian M. Matise, as personal representative of Granville C. Matise, deceased,
Plaintiff,
vs.
American Foreign Steamship Company, et al.,
Defendants.

[Filed June 13, 1974]

JUDGMENT ON MANDATE

Lillian M. Matise, as personal representative of Granville C. Matise, deceased, having appealed to the United States Court of Appeals for the Ninth Circuit from the judgment entered in this cause on the 15th day of December, 1971, and said Court having issued its Mandate dated the 9th day of April, 1974, wherein it was ordered, adjudged and decreed that such judgment be reversed, with costs assessed at $94.65 in favor of appellant;

Now upon the Mandate of the United States Court of Appeals for the Ninth Circuit, dated the 9th day of April, 1974,

It is Ordered, Adjudged and Decreed that the judgment of this Court entered December 15, 1971, be, and the same is hereby vacated and set aside; that the cause be restored to the docket for further proceedings in ac-

cordance with such Mandate; and that, pursuant to said Mandate, judgment be entered that Lillian M. Matise, as personal representative of Granville C. Matise, deceased, have and recover from American Foreign Steamship Corporation the following sums:

1. $510.00 as wages wrongfully withheld, with interest thereon at seven percent (7%) from March 24, 1969 to December 15, 1971, amounting to $95.62, for a total sum of $605.62;

2. $29,462.00 as penalty wages for the wrongful withholding of earned wages from March 24, 1969 to December 15, 1971, with interest thereon at seven percent (7%) from December 15, 1971, to June 7, 1974, amounting to $5,106.00;

3. $94.65 as costs on appeal;

4. $37.00 as costs in this Court.

Dated: June 13, 1974.

Robert H. Schnacke
Judge of the United States District Court

United States Court of Appeals
for the Ninth Circuit

No. 74-2721

Lillian M. Matise, as personal representative of Granville C. Matise, deceased,
Plaintiff-Appellee,
vs.
American Foreign Steamship Company, et al.,
Defendant-Appellant.

[Filed Sept. 27, 1974]

ORDER

Before: DUNIWAY and ELY, Circuit Judges

The appellee has presented herein two motions, (1) to expedite the appeal, (2) to require the appellant to post an adequate supersedeas bond. The only issue presented by the appeal is apparently whether the District Court complied with this court's judgment in *Matise v. American Foreign Steamship Co.*, ___ F.2d ___ (9th Cir. Mar. 8, 1974). The court is familiar with the record and has examined the District Court's judgment of June 13, 1974, the judgment challenged in the present appeal.

That judgment, in the court's opinion, conforms with the intention of this court, as expressed in its opinion of March 8, 1974. The subject appeal is therefore dismissed as frivolous.

United States Court of Appeals
for the Ninth Circuit

No. 74-2721

Lillian M. Matise, as personal representative of Granville C. Matise, deceased,
Appellee,

vs.

American Foreign Steamship Company, et al.,
Appellant.

[Filed Nov. 7, 1974]

ORDER

Before: DUNIWAY and ELY, Circuit Judges.

The motions panel concerned with the subject case (Duniway and Ely) has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

United States Court of Appeals,
Ninth Circuit

Nos. 72-2944, 72-2995.

Arnold Escobar,
Plaintiff-Appellant,

vs.

The SS Washington Trader, her engines, tackle, apparel, etc., et al.,
Defendant-Appellee.

Arnold Escobar,
Plaintiff-Appellee,

vs.

The SS Washington Trader, her engines, tackle, apparel, etc., et al.,
Defendant-Appellant.

June 5, 1974.

Before CHAMBERS and TRASK, Circuit Judges, and SHARP,* District Judge.

PER CURIAM:

Seaman Arnold Escobar and the SS Washington Trader et al. (Shipowner) cross appeal from a judgment which awarded Escobar limited double wage recovery pursuant to 46 U.S.C. § 596,[1] but ruled in favor of the Shipowner

*Honorable Morell E. Sharp, United States District Judge from the Western District of Washington, sitting by designation.

[1]46 U.S.C. § 596 reads, in pertinent part:
"The master or owner of any vessel [making foreign voyages] . . . shall pay to every seaman his wages . . . within

on its counterclaim for repatriation and medical costs paid by it on behalf of the seaman. In light of this court's recent holding in Matise v. American Foreign Steamship Co., 488 F.2d 469 (9th Cir., 1974), we reverse in part and remand for a recomputation of the double wage penalty.

The facts relevant to this appeal are as follows: On March 5, 1969, Escobar was discharged as a wiper aboard the SS Washington Trader and ordered removed from the vessel following an incident which occurred while the ship was tied up at Subic Bay, Philippine Islands. While descending the gangplank under police escort, Escobar fell and suffered a minor back injury. He was taken to a local United States naval hospital and remained there for treatment until March 10, 1969. Upon discharge from the hospital, Escobar was taken to Manila where he formally demanded his wages from an agent of the Shipowner. The agent initiated radio contacts between the company's New York office and the SS Washington Trader (which was then out at sea) but no payment was made. Meanwhile, Escobar encountered difficulties with Philippine immigration officials because of his alien status and was taken into custody. Upon the intercession of the United States consul in Manila, the Shipowner agreed to pay Escobar's air fare to San Francisco and Philippine expenses if Escobar signed a guarantee to reimburse the Shipowner for

twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens . . . . Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court . . . ."

all the repatriation costs. Escobar signed the agent's "Acknowledgement Certificate" to that effect and was flown to San Francisco on March 13, 1969. He was not, however, paid until April 4, 1969, and from his final wages of $888.04 the Shipowner deducted $536.72 representing repatriation costs. Escobar brought suit against the Shipowner in June 1970 challenging the legality of the wage deduction and asserting other claims arising out of the discharge not relevant to this appeal. On September 14, 1970, the Shipowner, upon the advice of counsel, tendered a cash payment of the disputed $536.72 to Escobar while expressly reserving its rights to the contested sum.

The District Court found that Escobar was discharged for good cause and the Shipowner was not responsible for Escobar's hospitalization and repatriation expenses following discharge. The court characterized the Shipowner's payment of repatriation expenses as a payment of wages "in kind" and concluded that the $536.72 wage deduction made on April 4, 1969, was proper. Escobar was accordingly ordered to refund the $536.72 he subsequently received in cash and to pay an additional $245 to the Shipowner representing unreimbursed medical expenses. However, the court also found that the Shipowner's delay in paying Escobar's wages was "without sufficient cause" and therefore subject to a 21-day wage penalty pursuant to section 596.[2] Both parties appeal from the above judgment.

[2]Without any explanation, the District Court found that the Shipowner had sufficient cause for nonpayment of wages during Escobar's hospitalization period from March 5, 1969 to March 10, 1969. The court accordingly assessed double wage penalties beginning on March 14, 1969, (four days after Escobar's discharge from the naval hospital) and running through April 4, 1969.

Preliminarily, we affirm the District Court's finding that the Shipowner was entitled to reimbursement for the repatriation and medical expenses it incurred on Escobar's behalf following the seaman's discharge for cause. However, this determination does not affect the central issue on this appeal: namely, the legality and consequences of the Shipowner's deduction of these costs from Escobar's wages. Congress has extensively regulated the types of deductions and set-offs which may be made from a seaman's wages, and the shipowner's mere right to recovery from the seaman will not legalize a deduction that is not recognized by the statutory scheme. Isbrandtsen v. Johnson, 343 U.S. 779, 72 S.Ct. 1011, 96 L.Ed. 1294 (1952). It is therefore necessary to determine whether the Shipowner's deduction of repatriation costs was proper here, and if not, whether the withholding of that portion of the seaman's wages is subject to a section 596 penalty. We believe that the answer to both these questions is circumscribed by Matise v. American Foreign Steamship Co., 488 F.2d 469, (9th Cir., 1974). In that case the plaintiff seaman, as here, was discharged for cause in a foreign port. The shipowner purchased an air ticket for the seaman, deducted the fare from the seaman's wages and tendered a voucher for the remainder of the wages. In order to actually collect the wages in San Francisco, the seaman was required to sign a written release. In finding that the air fare deduction constituted an unlawful withholding of Matise's wages, this court stated: "The statutory scheme enacted by Congress does not provide for set-offs or deductions for return transportation expenses, and Isbrandtsen has been applied to bar the deduction of repatriation costs from a seaman's wages." *Id.* at 472; *accord,* Schwark v. SS Rio Macareo, 249 F.Supp. 375 (E.D. La. 1966); *see also* Swain v. Isthmian Lines, Inc., 360 F.2d 81 (3d Cir. 1966); 1 Norris, Law of Seamen, § 355 (3d ed. 1970). Moreover, in *Matise* this court explicitly rejected the argument successfully advanced below that the shipowner's purchase of the plane ticket and assumption of expenses constituted a payment of wages "in kind":

> "Although the appellee contends that the transportation money spent on Matise's alleged behalf is the equivalent to the payment of wages to Matise, the applicable statutes explicitly and unequivocally provide that the wages due are to be paid to the seaman, 46 U.S.C. §§ 596-97. Furthermore, the shipowner here was acting to some extent in its own behalf, in view of its legal obligation to remove all persons, including a discharged seaman such as Matise, whom it had transported to South Vietnam. Even, however, had the money been spent entirely for the benefit of Matise, it could not be treated as a partial payment of his wages and thereby deducted from the total amount of wages that he had earned and to which he was entitled." 488 F.2d at 471.

We are therefore compelled to follow the above interpretation of 46 U.S.C. § 596 and *Isbrandtsen, supra,* and conclude that the deduction of repatriation costs from Escobar's wages was improper.

Turning next to the question of whether this deduction constituted a withholding of wages "without sufficient cause" under section 596, we are again bound by the reasoning of *Matise, supra.* The court there rejected the shipowner's arguments that uncertainty as to the legality of the deduction and reliance on the seaman's written

release each provided sufficient grounds to remove the withholding from the operation of the penalty statute. With regard to the former justification the court stated:

> ". . . [T]he case law has, for at least two decades, provided full notice to shipowners seeking to avoid the imposition of double wage penalties that only those deductions from wages that are allowed by statute are lawful. As the court remarked in Swain v. Isthmian Lines, Inc., *supra:* 'It has been eminently clear in the law, at the very least since the Supreme Court case of Isbrandtsen Co. v. Johnson in 1952 that a deduction from wages for medical expenses such as were incurred by appellee in the instant case is wrongful as falling outside the proper deductible instances . . . . This question, therefore has been closed for some time.' 360 F.2d at 83 (footnote omitted).
>
> "It is therefore clear that the shipowner in our case cannot claim that it had 'sufficient cause' to withhold a portion of Matise's wages because of reliance on the general maritime law which did not require a shipowner to pay the cost of repatriating a seaman discharged for good cause. As we have previously indicated, that argument has been without merit since the Supreme Court decided Isbrandtsen v. Johnson, *supra,* over twenty years ago." 488 F.2d at 473.

Accord, 1 Norris, *supra* § 392. The court also found that because execution of the written release was an express precondition to receipt of wages, the seaman was economically compelled to sign the document. Under these circumstances the court concluded that the shipowner was not justified in relying upon the release it coerced as a "sufficient cause" for withholding Matise's wages. Although the "Acknowledgement Certificate" signed by Escobar was

not explicitly a precondition to the payment of wages, we do not feel that this technical difference justifies a conclusion contrary to *Matise.* In the instant case the Shipowner demanded the guarantee from Escobar during the period in which it was unlawfully withholding the seaman's wages. Moreover, this withholding left Escobar, an illegal alien, stranded in the Philippines without funds. In short, these were the very circumstances which prompted Congressional enactment of much of the protective legislation for seamen and section 596 in particular. *See e. g.,* Ladzinski v. Sperling and Trading Corp., 300 F.Supp. 947, 954-955 (S.D.N.Y.1969).

We conclude therefore that the Shipowner improperly deducted repatriation costs from Escobar's wages and that this action constituted an unlawful withholding subject to the section 596 double wage penalty. The only remaining issue is the designation of the penalty period itself. Despite our concern for a possibly inequitable windfall recovery to the seaman, we agree with the Third Circuit that the language of section 596 is unequivocal and mandatory. Swain v. Isthmian Lines, Inc., 360 F.2d 81, 84-88, (3d Cir. 1966).[3]

We accordingly reverse in part and remand for further consideration in the light of this opinion.

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[3]The contrary view would assess the amount of section 596 penalty by considering "the equities of a particular case." Prindes v. SS African Pilgrim, 266 F.2d 125, 128 (4th Cir. 1959). *See also,* Southern Cross SS Co. v. Firipis, 285 F.2d 651 (4th Cir. 1960), cert. denied, 365 U.S. 869, 81 S.Ct. 903, 5 L.Ed.2d 859; Kontos v. SS Sophie, 236 F.Supp. 664 (D.C.Pa.1964). We find no support for a discretionary assessment of the double wage penalty in the present language of section 596 and find the reasoning in Swain, *supra,* persuasive.

CHAMBERS, Circuit Judge (concurring):

While I concur in the foregoing, the result is horrible. I am not concerned with the policy of double wage recovery generally. But the statute in this type of case results in a taking which is unconscionable. The Congress should do something about it.

Supreme Court, U. S.
FILED
MAY 1 1975

APPENDIX

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 74-966

AMERICAN FOREIGN STEAMSHIP COMPANY,
a corporation, *Petitioner*,

vs.

LILLIAN M. MATISE, as personal representative of
Granville C. Matise, deceased, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petition for Certiorari Filed February 4, 1975
Certiorari Granted March 17, 1975

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Subject Index

	Pages
Chronological list of relevant docket entries	1
Plaintiff's Exhibit 1—wage voucher	4, 5
Defendant's Exhibit G—mutual release	6
Memorandum Opinion and Judgment of District Court filed December 10, 1971	7
Opinion of Court of Appeals, filed March 8, 1974	10
Order of Court of Appeals denying Petition for Rehearing, filed April 4, 1974	19
Plaintiff's Motion to Enter Judgment filed April 22, 1974 in the District Court	22
Defendant's Memorandum in Opposition, filed May 14, 1974 in the District Court	24
Plaintiff's Reply Memorandum with Attached Exhibits A, B, C, D, E, and F, filed May 20, 1974 in the District Court	30
Judgment on Mandate of District Court filed June 13, 1974	46
Order of Court of Appeals, filed September 27, 1974	48
Petition for rehearing en banc, filed October 11, 1974 in the Court of Appeals	49
Order of Court of Appeals denying Petition for Rehearing en banc, filed November 7, 1974	51

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

March 13, 1970—Plaintiff's Complaint for Unpaid Wages and Penalty filed in U.S. District Court for the Northern District of California.

May 6, 1970—Defendant American Foreign Steamship Co.'s Answer filed in U.S. District Court for the Northern District of California.

January 5, 1971—Plaintiff's Notice of Motion and Motion for Summary Judgment filed in the U.S. District Court for the Northern District of California.

March 30, 1971—Defendant's Notice of Cross-Motion and Motion for Summary Judgment filed in the U.S. District Court for the Northern District of California.

September 8, 1971—Order entered denying plaintiff's Motion for Summary Judgment and denying defendant's Cross-Motion for Summary Judgment.

November 9, 1971—Pre-trial Order filed in the U.S. District Court for the Northern District of California.

December 10, 1971—Judgment entered in favor of defendant following Court trial.

January 3, 1972—Plaintiff's Notice of Appeal filed.

March 8, 1974—Opinion and Judgment of the U.S. Court of Appeals for the Ninth Circuit filed.

April 4, 1974—Order of the U.S. Court of Appeals for the Ninth Circuit amending its Opinion and denying defendant's Petition for Rehearing.

April 22, 1974—Plaintiff's Motion to Enter Judgment filed in the U.S. District Court for the Northern District of California.

May 13, 1974—Defendant's Memorandum in Opposition to plaintiff's Motion filed in the U.S. District Court for the Northern District of California.

May 20, 1974—Plaintiff's Reply Memorandum in Support of Motion to Enter Judgment filed in the U.S. District Court for the Northern District of California.

June 13, 1974—Judgment Entered by U.S. District Court for the Northern District of California awarding plaintiff $510.00 as wages wrongfully withheld, $29,462.00 as penalty wages, together with interest and costs thereon.

July 15, 1974—Defendant's Notice of Appeal filed.

August 30, 1974—Plaintiff's Application for Order Expediting Decision on Appeal filed in U.S. Court of Appeals for the Ninth Circuit.

September 11, 1974—Defendant's Opposition to plaintiff's Motion to Expedite Decision on Appeal filed in the U.S. Court of Appeals for the Ninth Circuit.

September 27, 1974—Order entered by the U.S. Court of Appeals for the Ninth Circuit dismissing defendant's Appeal.

October 11, 1974—Defendant's Petition for Rehearing en banc filed in the U.S. Court of Appeals for the Ninth Circuit.

November 7, 1974—Order entered by the U.S. Court of Appeals for the Ninth Circuit denying Petition for Rehearing and rejecting suggestion for a Rehearing en banc.

AMERICAN FOREIGN STEAMSHIP CORPORATION

J. H. Winchester
351 Calif. St., Rm. 520
Tel: 781-0918

80 Broad Street, New York, N. Y. 10004

PAY VOUCHER

Voucher No. ____ of ____

S.S. AMERICAN HAWK Voy. No. 26 Port of SAIGON Date 3/19/69

Name GRANVILLE C. MATISE Rating OILER W4 Status 4 Soc. Sec. No. 464 18 7559

WAGES								
From	1/11/69	to	3/19/69	2 mos.	9 days @ $ 443.71	per mo.	$1020.53	1020.53
From	____	to	____	____ mos.	____ days @ $ ____	per mo.	____	
From	____	to	____	____ mos.	____ days @ $ ____	per mo.	____	$ ____
AREA BONUS								
From	2/ 7/69	to	2/16/69		10 days @	$14.79 per day	$ 147.90	147.90
EXPLOSIVE AND OTHER BONUSES								
From	3/13/69	to	3/19/69	____ mos.	7 days @	14.79 per mo.	$ 103.53	103.53
OVERTIME								
206 hours @		2.80	per hour				576.80	576.80
____ hours @		____	per hour					

TOTAL EARNED SUBJECT TO INCOME TAXES $1848.76

FOR F.I.C.A. TAX PURPOSES ONLY

TOTAL EARNED ____ $1848.76

ADD

Board and Lodging 60 days @ $1.28 per day ____ 81.60

Subsistence and Lodging Ashore ____ days @ $____ per day ____

TOTAL SUBJECT TO F.I.C.A. TAX $ 1930.36

ADD Subsistence Ashore—From ____ to ____ days @ $ ____ per day $____

Lodging Ashore—From ____ to ____ days @ $ ____ per day $____

Transportation, Etc. ____ $____

TOTAL AMOUNT DUE $1848.76

N.R.A. TAX COMPILATION—Citizen/Subject of ____

Total Earned For Voy. $____ Per cent of Voy. in U.S.A. ____ %____

Amount Earned for ____ days in U.S. Territorial Waters ____ $____

Less—Exemption Full Voyage of ____ days @ $____ per day $____

AMOUNT SUBJECT TO TAXES $____

DEDUCTIONS TRANSPORTATION SAIGON TO SAN FRANCISCO	510.00	
Advances	$ 334.12	
Slop Chest	51.01	
Allotments	400.00	
Fines	114.73	
Withholding Tax For 68 days on $1848.76 (Per Official Wage Bracket Table)	227.80	
F.I.C.A. Tax 4.8% of $1930.36	92.65	
TOTAL DEDUCTIONS		$1730.31
BALANCE DUE		$ 118.45

Extensions and Additions checked

By ____

I certify that this pay voucher is true and correct; that the person named hereon was employed and has performed the services for the period stated above; and that the person whose name appears on this pay voucher is entitled to the amount of pay stated for him.

W. H. ROYAL
Master (or other authorized representative)

Received Payment in Full for all Services Stated Above

AMERICAN HAWK

G. C. MATISE
Employee's Signature
CK A-1983 JHW-SF
3/24/69 — a/c 600 AJH

Treasury Department
U. S. Coast Guard
CG-718A (Rev. 6-52)

MUTUAL RELEASE

Official number of vessel 243969

To: COMMANDANT (MVP-1) (Original)

We, the undersigned, seamen on board the SS AMERICAN HAWK on her late voyage from LONG BEACH CALIFORNIA to FOREIGN for which articles were opened at LONG BEACH CALIFORNIA on 11 JANUARY, 1969, do hereby, each one for himself, by our signatures herewith given, in consideration of settlements made before the Shipping Commissioner at this port, release the master and owners of said vessel from all claims for wages in respect of the said past voyage or engagement, and I, master of said vessel, do also release each of the seamen signing said release from all claims, in consideration of this release signed by them.

Dated 24 MARCH, 1969

Port of SAN FRANCISCO, CALIF.

W. H. Royal (Absent)
Master.

ATTEST as to said master and the One (1) seamen whose signatures appear below.

/s/
Shipping Commissioner.

Social Security No.	EG-739 issued Seaman's Signature	Continuous Discharge Book or Certificate of Identification No.	Rating	Date Wages Commenced 1969	Date of This Settlement 1969	Wages per Month	Total Wages Earned	Total Deductions	Amount Cash Received on This Settlement
464-18-7559	Granville C. Matise	Z-1064629-D2	Oiler	1/11	3/19	443.71	1843.76	1730.31	118.45

REPORTED LEFT VESSEL AT SAIGON SOUTH VIET NAM 3-19-69 FIRED ARTICLES REMAIN OPEN

Sighted Certificate of Discharge No. I 6338532 Dated 3-19-69 issued by U.S. Vice Consul at Saigon South Viet Nam.

The United States District Court
Northern District Of California

Before: Hon. Robert H. Schnacke, Judge

No. C-70 538 RHS

Granville C. Matise, Plaintiff,
vs.
American Foreign Steamship Corporation, et al., Defendants.

REPORTER'S PARTIAL TRANSCRIPT

December 10, 1971

Appearances:
For Plaintiff:
Eric J. Schmidt, Esquire
220 Bush Street
San Francisco 94104
For Defendants:
Graham & James
Attorneys at Law
By: John A. Flynn, Esquire
310 Sansome Street
San Francisco 94104

December 10, 1971

THE COURT: All right, gentlemen. I thank you for your argument.

None of the cases cited by the plaintiff seem to be precisely the case that we have here, and none of them caused me to change my view on the state of the law.

It is perfectly plain that in any disputed matter, as between the shipowner or the master of the ship and the seaman, the master clearly may not resolve the dispute in his own favor by taking a deduction that is in any way subject to review or consideration. But that doesn't mean that a seaman is totally incapable of directing the application of his own funds, and from the evidence that's before me I must find that that is what happened in this case: that the seaman here, who was at all times significant herein, a member of the vessel AMERICAN HAWK, was a citizen of the United States, signed on at Long Beach January 10, 1969, and who was discharged for willful misconduct and neglect of duty in Saigon on March 19, 1969, was properly discharged for good and lawful cause.

From the evidence it's undisputed that the obligation to repatriate the plaintiff was not upon the shipowner, but was rather the personal responsibility of the seaman.

By reason of regulations of the Army and the government of South Vietnam at the time of the discharge, it was impossible to permit the transfer of money to the seaman to permit him to go ashore to buy his own ticket. The currency regulations of South Vietnam had required the sealing of the safe of the AMERICAN HAWK; and under the circumstances in Saigon at the time, airline tickets could be purchased only with United States currency.

The plaintiff consented to and approved the purchase of an airline ticket for his purposes with his money under circumstances that were arranged by the master and the vice consul with the special permission of the South Vietnamese customs officials. The purchase of that ticket under those circumstances constituted the equivalent of payment of monies over to the seaman.

The release that he later signed in signing off the articles and in accepting the pay voucher and in the later release, which is Exhibit G, don't constitute a waiver of claim in any fashion, and they weren't received in evidence for that purpose, but they do indicate that this was not and never has been a disputed item in any way. They are evidence of the consent and approval of the plaintiff of the payment to him in this fashion. Accordingly, his having been paid everything that he was entitled to be paid obviously precludes his being successful in an action of this sort.

So it is the conclusion of the Court that this Court has jurisdiction under the General Maritime Law; the plaintiff was lawfully and properly discharged for cause by reason of his own willful misconduct and neglect of duty; that there was no unlawful withholding by the defendant of the sum of $510.00 or any other amount; and that since there was no unlawful withholding or illegal deduction from plaintiff's earned wages, there are no grounds for recovery of the double-wage penalty.

Accordingly, the defendant is entitled to judgment in this action with costs.

The transcription of my remarks here will constitute the Court's findings of fact and conclusions of law for all purposes of the case.

United States Court of Appeals
Ninth Circuit

No. 72-1345

Lillian M. Matise, as personal representative of Granville C. Matise, Deceased, Appellant

vs.

American Foreign Steamship Co., Appellee

March 8, 1974
As Amended on Denial of Rehearing
April 4, 1974

Before MERRILL and ELY, Circuit Judges, and EAST,* District Judge.

OPINION

ELY, Circuit Judge:

This appeal arises from a suit brought by Granville C. Matise,[1] a seaman, against American Foreign Steamship Corporation, in which Matise alleged that $510.00 of his earned wages had been unlawfully withheld from him. He sought the recovery of these wages and claimed the double wage penalty allowed to seaman for wages

*Honorable William G. East, Senior United States District Judge, District of Oregon, sitting by designation.

[1]Matise died during the pendency of his suit. The State of Maryland appointed Lillian M. Matise as his Personal Representative, and, pursuant to stipulation, the District Court substituted her as the plaintiff in the action.

withheld without sufficient cause.[2] The District Court, in a trial without jury, found that there was no unlawful withholding and entered judgment for the shipowner. We reverse.

Briefly, the facts of the case are these: Matise signed articles of employment as an oiler for a foreign voyage aboard the S.S. American Hawk, appellee's vessel, on January 11, 1969 in Long Beach, California. He was discharged for good cause on March 19, 1969 in Saigon, South Vietnam, in the presence of the ship's captain, the United States Vice Consul, and two United States Coast Guard officials. The captain was advised by the Vice Consul and Coast Guard officials that the shipowner did not have a duty to pay the cost of transportation to repatriate Matise, since his discharge was for good cause. These officials were not acting within their official authority in so advising the ship's captain. The shipowner was obliged by treaty and by the laws of the government of South Vietnam to remove all persons brought to South Vietnam by the ship. At that time, however, South Vietnam prohibited American seamen from carrying United States currency ashore and required that the ship's safe containing currency be sealed. Thus, Matise

[2]46 U.S.C. § 596 reads, in pertinent part:

"The master or owner of any vessel [making foreign voyages] . . . shall pay to every seaman his wages . . . within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens . . . Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court. . . ."

could not simply be paid the wages that were due him and put ashore. Furthermore, an airline ticket for transportation to the United States from Saigon could only be purchased with United States currency. With the approval of the Vice Consul, the ship's captain was granted permission *by* South Vietnamese Customs to break the seal on the vessel's safe and withdraw the amount necessary to purchase an airline ticket to the United States, $510.00. The ship's captain then purchased, or arranged for his agent to purchase, the ticket, which was given to Matise. In the presence of the Vice Consul, the two Coast Guard officials, and the ship's captain, Matise was given a Wage Voucher signed by the captain in the amount of $118.45. The cost of the airline ticket had been deducted from the full amount of wages due Matise, and $118.45 was the remainder. While there is some dispute as to whether or not the seaman signed the Wage Voucher while in Saigon, the Voucher indicates on its face that it was signed by Matise in San Francisco. After arriving in the United States, Matise was signed off the ship's articles by the U.S. Shipping Commissioner in San Francisco. The Commissioner required Matise to sign a release as a condition to the latter's receiving any part of his wages. Matise took the release and the Wage Voucher as prepared by the captain to the shipowner, which in turn required Matise to sign the Voucher in order to receive any of his wages. On these facts, the District Court found that the $510.00 used to purchase the airline ticket to repatriate Matise was a partial payment of wages and that there was therefore no unlawful withholding.

Here, the questions are: (1) Was there an unlawful withholding of Matise's wages? (2) If so, was the unlawful withholding without sufficient cause?

As a general principle of maritime law, when a seaman is discharged for good cause in a foreign port, the seaman's misconduct, is, in effect, a breach of the seaman's contract with the ship and terminates the shipowner's obligation to bring the seaman home. Norris, The Law of Seamen (3rd Ed.) Vol. 1, Section 420 (1970); Ward v. United States, 66 F.Supp. 237 (D.C. 1946). Furthermore, by statute, the wages of a seaman on a foreign voyage become due and payable within twenty-four hours after the cargo has been discharged or within four days after the seaman has been discharged, whichever first occurs. 46 U.S.C. §596. Failure to pay the seaman within the statutory time limit, without sufficient cause, subjects the shipowner to double wage penalties. 46 U.S.C. §596.

The appellee argues that since maritime common law only requires a shipowner to pay wages to a seaman discharged for cause, the ship's captain effectively paid Matise part of his wages by buying him a ticket home. The appellee's argument cannot stand in view of the far-reaching protection of seaman's wages which is now provided by statute. As the Supreme Court said in Isbrandtsen v. Johnson, 343 U.S. 779, 784, 72 S.Ct. 1011, 1015, 96 L.Ed. 1294 (1952):

"Congressional legislation now touches nearly every phase of a seaman's life . . . . It deals specifically with his shipping articles and the payment to him of his wages . . . . It insures the payment to him of the balance of [his] wages upon completion of his voyage or shortly

after discharge. It deals explicitly with the final payment of wages."

The shipowner in this case did not pay part of Matise's final wages in Saigon, as it argues, since the $510.00 was not paid to Matise but to an airline. Although the appellee contends that the transportation money spent on Matise's alleged behalf is equivalent to the payment of wages to Matise, the applicable statutes explicitly and unequivocally provide that the wages due are to be paid *to the seaman,* 46 U.S.C. §§596-597. Furthermore, the shipowner here was acting to some extent in its own behalf in view of its legal obligation to remove all persons, including a discharged seaman such as Matise, whom it had transported to South Vietnam. Even, however, had the money been spent entirely for the benefit of Matise, it could not be treated as a partial payment of his wages and thereby deducted from the total amount of wages that he had earned and to which he was entitled. In Gonzales v. Isthmian Steamship Co., 1958 A.M.C. 97 (E.D.Pa. 1957), the shipowner paid for a lawyer and incurred related expenses for the benefit of a seaman held in jail on charges of assault. Although the seaman had signed an agreement with the ship allowing the expenditures to be paid as an advance on his wages, the District Court refused to allow the shipowner to deduct the amount of the expenses from the seaman's wages. The Court said: ". . . except as expressly provided by law, a seaman cannot give up any right to wages, or any remedy for the recovery of wages, even by agreement." 1958 A.M.C. at 105. In so writing, the court followed the rule of Isbrandtsen v. Johnson, *supra,* which held that only those specific deductions and set-offs designated by statute

could be withheld from a seaman's wages. In *Isbrandtsen* the Supreme Court held that regardless of the validity of the shipowner's claim against the seaman, the shipowner may not withhold the seaman's wages to satisfy those claims. The Supreme Court wrote:

"Congress has gone so far in expressly listing such deductions and set-offs that it is a fair inference that those not listed may not be made. It thus remains for the courts to determine only what are the deductions or set-offs for derelictions of duty that are listed by Congress, rather than to determine which of the deductions or set-offs once known to the general maritime law Congress has failed to exclude. Congress, in effect, has excluded all of them except those which it has listed affirmatively." 343 U.S. at 789, 72 S.Ct. at 1017.

The statutory scheme enacted by Congress does not provide for set-offs or deductions for return transportation expenses, and *Isbrandtsen* has been applied to bar the deduction of repatriation costs from a seaman's wages. In Schwark v. S.S. Rio Macareo, 249 F.Supp. 375 (E.D. La. 1966), a seaman was discharged for good cause in a foreign port, just as was Matise in our case. An agreement in the articles of the ship provided that the ship was not obligated to pay the cost of repatriating any crewmember discharged for cause. Nevertheless the court held that as a matter of law, the ship could not offset the cost of repatriating the seaman against his wages, even though the court found that the ship had a valid claim against the seaman for that amount. *See also* Swain v. Isthmian Lines, Inc., 360 F.2d 81 (3d Cir. 1966), wherein the shipowner was required to restore wages and pay a double wage penalty for withholding from a sea-

man's wages the cost of medical treatment paid by the ship, a cost for which the seaman was admittedly liable; Keen v. United States, 199 F.2d 151 (2d Cir. 1952), wherein a shipowner who had deducted from a seaman's wages the cost of medical treatments and transportation to the United States was assessed double penalty wages; Shilman v. United States of America Shipping Administration, 164 F.2d 649 (2d Cir. 1947), cert. denied, 333 U.S. 837, 68 S.Ct. 608, 92 L.Ed. 1122 (1948), wherein the Second Circuit held that a seaman discharged in a foreign port is entitled to receive all his earned wages, without any deductions whatsoever except those specifically authorized by statute; Ventiadis v. C. J. Thibodeaux & Co., 295 F.Supp. 135 (S.D.Tex. 1968), wherein it was held that although a seaman had signed a release, left the ship at his own request, and was flown at company expense to his home port in Greece, he was nevertheless entitled to double penalty wages for the repatriation costs deducted from his wages.

The foregoing authorities make it clear that the shipowner, in deducting transportation costs from Matise's wages, unlawfully withheld those wages within the meaning of 46 U.S.C. § 596. Furthermore, the case law has, for at least two decades, provided full notice to shipowners seeking to avoid the imposition of double wage penalties that only those deductions from wages that are allowed by statute are lawful. As the court remarked in Swain v. Isthmian Lines, Inc., *supra:*

"It has been eminently clear in the law, at the very least since the Supreme Court case of Isbrandtsen Co. v. Johnson in 1952 that a deduction from wages for medical expenses such as were incurred by appellee in the instant

case is wrongful as falling outside the proper deductible instances . . . . This question, therefore has been closed for some time." 360 F.2d, at 83 (footnote omitted).

It is therefore clear that the shipowner in our case cannot claim that it had "sufficient cause" to withhold a portion of Matise's wages because of reliance on the general maritime law which did not require a shipowner to pay the cost of repatriating a seaman discharged for good cause. As we have previously indicated, this argument has been without merit since the Supreme Court decided Isbrandtsen v. Johnson, *supra,* over twenty years ago.

The only remaining question is whether the shipowner can avoid double wage penalties because Matise signed the Wage Voucher and mutual release before the shipping commissioner. Where, as here, a seaman has been compelled to sign a release and Wage Voucher in order to receive wages which the shipowner admits are due, the release has been set aside by the courts as having been executed under duress. In Prindes v. S.S. African Pilgrim, 266 F.2d 125 (4th Cir. 1959), a seaman was logged two days' pay for failing to return to his ship one hour before the posted sailing time as his contract required. At the termination of the voyage the seaman was offered his earned wages minus the logged pay, but before he could receive *any payment* he was required by the ship to sign a Wage Voucher and a mutual release. The court, in holding that the Wage Voucher and release were invalid, declared: "It is well settled that a seaman is entitled to double wages or 'waiting time' under 46 U.S.C.A. § 596, if wages concededly due are tendered only upon condition that he will release disputed claims." 266 F.2d at 127. And in Isthmian Lines, Inc. v. Haire, 334 F.2d

521 (5th Cir. 1964), the shipowner contended that the seaman's right to maintenance and cure monies was foreclosed because of a mutual release that the seaman had executed before the shipping commissioner when his earned wages were paid. The Fifth Circuit, in affirming the District Court's judgment in favor of the seaman emphasized:

"The Shipping Commissioner is no roving arbiter of all of the disputes between ship and seaman. He is given no power to resolve unliquidated demands for cure, for maintenance . . . . Moreover, as a principle of ordinary law—land-locked, seagoing, or amphibious—a release for payments for amounts admittedly due lacks consideration." 334 F.2d at 523. *See* 46 U.S.C. § 597, which provides that any court having jurisdiction may on good cause shown set aside a release signed before a shipping commissioner and take such action as justice may require. *See also* Garrett v. Moore-McCormack Co., 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 239 (1942), and Pacific Mail S.S. Co. v. Lucas, 258 U.S. 266, 42 S.Ct. 308, 66 L.Ed. 614 (1922).

Matise was misinformed in Saigon by the Vice-Consul, the two Coast Guard officers, and his captain by their representations to him that he could "be forced to spend his own money to send him back home." Furthermore, he was compelled to sign the release and Wage Voucher in order to receive the remainder of his wages that admittedly were due. In these circumstances, we hold that neither the Wage Voucher nor the release can in any manner be treated as a waiver by Matise of his claim or a factor tending to show that the shipowner had "sufficient cause" to withhold a part of Matise's wages.

Reversed.

United States Court of Appeals
Ninth Circuit

No. 72-1345

Lillian M. Matise, as personal representative of Granville C. Matise, deceased,
Appellant,
vs.
American Foreign Steamship Co.,
Appellee.

[Filed April 4, 1974]

On Petition For Rehearing

ORDER

Before: MERRILL and ELY, Circuit Judges, and EAST, District Judge.*

The court amends its opinion in the subject cause by deleting the last sentence of the first incomplete paragraph on page 3 of the slip opinion dated March 8, 1974. The sentence, now deleted, read: "The District Court further found that even had there been an unlawful withholding, it was not without sufficient cause within the meaning of 46 U.S.C. § 596." The court's opinion having been amended as above specified, the Petition for Rehearing is DENIED.

*Honorable William G. East, Senior United States District Judge, District of Oregon, sitting by designation.

In The United States District Court
For the Northern District of California

No. C-70 538 RHS

Lillian M. Matise, as personal representative of Granville C. Matise, deceased,
Plaintiff,
vs.
American Foreign Steamship Company, et al.,
Defendants.

[Filed June 13, 1974]

JUDGMENT ON MANDATE

Lillian M. Matise, as personal representative of Granville C. Matise, deceased, having appealed to the United States Court of Appeals for the Ninth Circuit from the judgment entered in this cause on the 15th day of December, 1971, and said Court having issued its Mandate dated the 9th day of April, 1974, wherein it was ordered, adjudged and decreed that such judgment be reversed, with costs assessed at $94.65 in favor of appellant:

Now upon the Mandate of the United States Court of Appeals for the Ninth Circuit, dated the 9th day of April, 1974.

It is Ordered, Adjudged and Decreed that the judgment of this Court entered December 15, 1971, be, and the same is hereby vacated and set aside; that the cause be restored to the docket for further proceedings in ac-

cordance with such Mandate; and that, pursuant to said Mandate, judgment be entered that Lillian M. Matise, as personal representative of Granville C. Matise, deceased, have and recover from American Foreign Steamship Corporation the following sums:

1. $510.00 as wages wrongfully withheld, with interest thereon at seven percent (7%) from March 24, 1969 to December 15, 1971, amounting to $95.62, for a total sum of $605.62;

2. $29,462.00 as penalty wages for the wrongful withholding of earned wages from March 24, 1969 to December 15, 1971, with interest thereon at seven percent (7%) from December 15, 1971, to June 7, 1974, amounting to $5,106.00;

3. $94.65 as costs on appeal;

4. $37.00 as costs in this Court.

Dated: June 13, 1974.

Robert H. Schnacke
Judge of the United States District Court

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In the United States District Court
for the Northern District of California

No. C-70 538 RHS

Lillian M. Matise, as personal representative of Granville C. Matise, deceased,
Plaintiff,
vs.
American Foreign Steamship Company, et al.,
Defendants.

[Filed April 22, 1974]

PLAINTIFF'S MOTION TO ENTER JUDGMENT IN CONFORMITY WITH THE MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Plaintiff above named moves the Court as follows:

That it act upon the Mandate of the opinion of the United States Court of Appeals for the Ninth Circuit, issued April 9, 1974, reversing judgment for defendants, as attached hereto, and

That it enter final judgment for the plaintiff, as attached hereto.

The foregoing motion is based upon the Mandate of the United States Court of Appeals issued April 9, 1974, and on the Memorandum of Points and Authorities attached hereto.

Dated: April 22, 1974.

/s/ Eric J. Schmidt
Eric J. Schmidt
Counsel for Plaintiff

Memorandum of Points and Authorities

Tit 46, U.S.C. Sec. 596

Isbrandtsen v. Johnson, 72 S.Ct. 1011, 343 U.S. 779

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In The United States District Court
For the Northern District of California

No. C-70 538 RHS

Lillian M. Matise, as personal representative of Granville C. Matise, deceased,
Plaintiff,
vs.
American Foreign Steamship Company, et al.,
Defendants.

[Filed May 14, 1974]

MEMORANDUM OF POINTS AND AUTHORITIES

Comes Now defendant American Foreign Steamship Company, a corporation, and submits the following Memorandum of Points and Authorities in opposition to plaintiff's motion to enter judgment in accordance with the Mandate issued from the United States Court of Appeals for the Ninth Circuit in the captioned matter.

Defendant contends that the United States Court of Appeals for the Ninth Circuit in its Opinion herein did not rule as a matter of law that the deduction in question was "without sufficient cause" within the meaning of 46

U.S.C. § 596. Moreover, and in any event, judgment should not be entered for plaintiff as prayed in the sum of Twenty-Nine Thousand Four Hundred and Sixty-Two Dollars ($29,462.00) representing penalty wages for the period March 24, 1969 to December 15, 1971 without this Court having fully considered all evidence and exercising its discretion in adjusting the duration of the penalty to the equities of this case.

A review of plaintiff's memoranda and supporting papers in its motion to obtain entry of judgment indicates that plaintiff interprets the opinion as amended by the United States Court of Appeals for the Ninth Circuit as holding as a matter of law that the defendant shipowner deducted or withheld the Five Hundred and Ten Dollars ($510.00) in question without sufficient cause within the meaning of 46 U.S.C. § 596. This Trial Court did not rule on the question of double wages since it concluded there was no unlawful withholding of earned wages. The question whether a refusal or neglect to pay earned wages is without sufficient cause presents a legal-factual question requiring a hearing on the merits. *McConville v. Florida Towing Corp.*, 321 F.2d 162 (5th Cir., 1963). Defendant respectfully submits that a close reading of the opinion of the Appellate Court shows that insofar as the question of double wages is concerned the Ninth Circuit merely held that the shipowner cannot claim that it had sufficient cause because of reliance on the General Maritime Law which does not require a shipowner to pay the cost of repatriating a seaman discharged in a foreign port for good cause, and that neither the wage voucher nor the release executed by the seaman can be claimed by the shipowner

as evidence tending to show that it had sufficient cause to withhold a portion of his wages.

As construed by the United States Supreme Court the words "refuses or neglects to make payment . . . without sufficient cause" connotes conduct which is in some sense arbitrary or willful and amounts to something more than merely valid defenses to a wage claim. *Collie v. Fergusson,* 281 U.S. 55, 74 L.Ed. 698 (1930). The phrase "without sufficient cause" in effect means a willful, unreasonable and arbitrary attitude upon the part of the Master or shipowner in refusing to pay earned wages to the seaman. Norris, The Law of Seaman (3rd ed.) § 385. The United States Supreme Court in *Collie,* Supra, went on to hold that liability for double wages is not incurred where the refusal to pay is in some reasonable degree morally justified. 281 U.S. p.56. In *McCrea v. United States,* 294 U.S. 23, 55 S.Ct. 291, 79 L.Ed. 735 (1936), the United States Supreme Court reiterated that a showing of arbitrary, willful or unreasonable conduct by the Master or shipowner was required before double wages would be imposed. Review of the opinion of the Appellate Court herein reveals an absence of any holding or finding that the Master or shipowner acted willfully, unreasonably or arbitrarily.

Thus, whether penalty wages should be imposed depends upon all the circumstances of the withholding. *Payne v. SS TROPIC BREEZE,* 274 F.Supp. 324 (D. Puerto Rico, 1967), reversed on other grounds, 291 F.2d 709. Accordingly, a refusal and neglect to pay wages within the meaning of § 596, when based in good faith upon questions of fact or the applicability of rules of law

which results in honest good faith litigation will be considered sufficient cause. *O'Hara v. Luckenbach SS Co.,* 16 F.2d 681 (9th Cir., 1926); *Korthinos v. The Niarchos,* 184 F.2d 716 (4th Cir., 1950), cert. den. 341 U.S. 905. See also *The Thomas Tracy,* 24 F.2d 372 (2d Cir., 1928), cert. den. 277 U.S. 595. Similarly, where a wage dispute and discharge of a seaman is placed before an American consul by a Master acting in good faith, and where the consul rules in favor of the Master, it has been held that refusal to pay seaman's wages at that time was not without sufficient cause. *Gold v. Matson Navigation Co.,* 73 F.2d 808 (9th Cir., 1934).

Defendant respectfully submits that a ruling on the question of sufficient cause requires consideration of not only the applicable law but all the circumstances surrounding the discharge and repatriation of this seaman, including the absence of any evidence of evil intent or arbitrary and unreasonable state of mind by the Master, the Master's good faith and reasonable belief that the purchase of the airline's ticket for the seaman's return transportation was not an illegal withholding of his earned wages but essentially amounted to a partial payment of his earned wages, the applicable currency regulations precluding payment to the seaman in U.S. dollars and the concurrence and approval of the U.S. Vice Consul and U.S. Coast Guard representatives. Defendant submits that these factors not touched upon by the Appellate Court in its discussion of the double wage penalty, considered in their entirety established that the deduction in question was not without sufficient cause.

Finally, plaintiff's request that the Court enter judgment for double wage penalties for the period March 24, 1969 through and including December 15, 1971 (the date the Trial Court entered judgment in favor of the defendant shipowner) fails to take into account the power of this Court to exercise its discretion in adjusting the duration of the penalty to the equities of the particular case. Norris, The Law of Seaman (3rd ed.), § 416; *Southern Cross SS Co. v. Firipis,* 285 F.2d 651 (4th Cir., 1960), cert. den. 365 U.S. 869; *Prindes v. The SS African Pilgrim,* 266 F.2d 125 (4th Cir., 1959); *Mavromatis v. United Greek Shipowners Corp.,* 179 F.2d 310 (1st Cir., 1949); *Pacific Mail SS Co. v. Schmidt,* 214 F. 513 (9th Cir., 1914), reversed on other grounds 241 U.S. 245.

As stated by the Fourth Circuit in *Mystic SS Co. v. Stromland,* in the opinion denying a rehearing: "it was certainly not the intention of Congress that the statute should be construed in such a way as virtually to deny to shipowners the right to contest liability in cases of this sort by making the penalty so great in case of failure to maintain the defense asserted as to deter them from making any defense at all." 21 F.2d 607 (4th Cir., 1927).

In addition to limiting the period of time during which the penalties run by virtue of the equities of the particular case, the Courts have similarly limited the period where diligence has not been shown by the seaman in instituting suit. *Caribbean Federation Lines v. Dahl,* 315 F.2d 370 (5th Cir., 1963), cert. den. 375 U.S. 831; *Kontos v. SS Sophie C.,* 236 F.Supp. 664 (D.C. Pa., 1964); *Forster v. Oro Navigation Co.,* 128 F.Supp. 113 (D.C.N.Y., 1954),

affirmed at 228 F.2d 319. In this connection, defendant respectfully points out that the date claimed by plaintiff upon which payment should have been made to the seaman is March 24, 1969 and the Complaint was not filed until March 13, 1970 or approximately one year later.

In addition to the circumstances surrounding the discharge and repatriation of this seaman and the good faith conduct of the Master, all of which should be considered by this Court in its consideration of limiting the penalty period to the equities, defendant submits that any neglect to pay wages was based in good faith upon issues of fact and applicability of rules of law resulting in litigation which at the trial level sustained the position of the shipowner. Under such circumstances it would be wholly unjust to rule that the shipowner's conduct was without sufficient cause.

Wherefore, defendant respectfully prays that plaintiff's motion to enter judgment in the amounts prayed be denied.

Dated: May, 14, 1974.

Graham & James
By John A. Flynn
Attorneys for Defendant

I hereby certify that on May 14, 1974 I mailed a true copy of the foregoing to the following:

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In The United States District Court
For The Northern District Of California

No. C-70 538 RHS

Lillian M. Matise, as personal representative of Granville C. Matise, deceased, Plaintiff,

vs.

American Foreign Steamship Company, et al., Defendants.

[Filed May 20, 1974]

PLAINTIFF-APPELLANT'S REPLY MEMORANDUM

A part of the appellee's argument on this motion is devoted to a challenge of the Appellate Court's finding of liability. The response sought by appellee would require this Court to reverse the Court of Appeals on that issue. This part of the argument will not be discussed in this reply, for the reason that it is completely meritless. The Appellate Court found that the withholding was illegal and that the shipowner did not have sufficient cause for having made it. The question of sufficient cause was ruled

upon as a matter of law, based upon the facts which were placed before the Court by the record on appeal. The Court plainly stated its reasoning, both with respect to the grounds urged by the defendant and with respect to the general maritime law. The question of liability is settled.

Another portion of the appellee's argument is devoted to claiming a *reduction of the damages* awarded, based upon a concept which has been applied in certain other double-wage cases, and which has been labeled "tailoring."

There are three separate, compelling reasons why this theory is totally inapplicable to the present motion for judgment on mandate.

I. The defense is untimely;

II. The concept itself is illegal;

III. If it were timely and legal, the concept of tailoring is inapplicable to the present case.

Untimely

The trial below was not bifurcated. The damage issue was tried as well as the liability issue. All defenses concerning the amount of damages were required to be presented at the trial. The trial court's ruling that no liability existed followed the trial of all issues. No defense that had not been raised could be raised thereafter.

The argument to limit damages which is being made today was not made at the trial. It was not preserved for appeal. It was not presented to the Court of Appeals. It was not referred to in the Appellee's Petition for Rehearing. Its presentation on a motion for judgment on mandate is in total conflict with the entire concept of appellate

procedures. The appellant presented to the Court of Appeals the exact dollar amount which he claimed and that Court has found for him and his claim. No other amount was ever presented or contended for. The argument to limit the damages which is presented by the appellee for the first time on this motion is late by several years.

Illegal

In 1782 the Congress enacted the first penalty statute aimed at enforcing prompt payment of seamen's wages. It required a shipowner to pay *one* day's wage for each day of delay up to a limit of ten days' wages.

In 1872 (Shipping Commissioner's Act of June, 1872) the Congress increased the penalty by removing the time limitation, requiring the payment of one day's wage for each day of delay until the debt was paid or judgment entered.

In 1915 (LaFollette Act) the Congress again increased the penalty by requiring the payment of *two* days' wages for each day's delay until the debt was paid or judgment entered.

This law resulted in the accrual of heavy penalties, as it was obviously intended by Congress that it would, if the prohibited delay was allowed to occur.

> "After all, if sufficient cause for the deduction is found to be lacking, the shipowner or his agent has either been overtly culpable in reducing a seaman's wages, or significantly inattentive in his duties, viz-a-viz the seaman's wage rights. As we view it, it is precisely the possibility that large penalties will accrue that should motivate a shipowner to exercise care in computing wages due a seaman. We think that this deterrent was what Congress had in mind in providing for a penalty in the form of inflexible liquidated damages."
>
> *Swain v. Isthmian Lines, Inc.* 360 F.2d 81 (1966)

The unequivocal trend of the law over one and a half centuries has been toward increasing the penalty.

Subsequent to the latest amendment several courts devised a concept which permitted them to disregard the amount of the penalty as specifically provided by statute and apply equitable principles, as viewed by them, to reduce the total amount of the award to whatever amount satisfied their own feelings in the matter. Under this theory, if the seaman delayed in filing his action or did not pursue it diligently, the court "tailored" the award to lessen the penalty imposed on the shipowner for its breach of the law.

Under this concept, any court which chooses to do so can abrogate the 1915 amendment by Congress and determine the penalty in accordance with the law as it existed prior to that amendment. It can, if it chooses, abrogate both the 1915 amendment and the 1872 amendment and award the seaman only the amount he would have received under the original enactment of 1782. The amount is taken out of Congress' hands and determined by individual judges.

This power to abrogate and amend Congressional enactments to suit equitable concepts as viewed by individual courts clearly does not exist.

While some courts have adopted the "tailoring" concept, others have emphatically rejected it. Undoubtedly the most thoroughly reasoned decision on the question is that in

Swain v. Isthmian, supra, where the court reviews the entire history of the concept and declares,

> "In our view, those cases supporting the superimposition of equitable concepts on to Section 596 have, in fact, mitigated the statutory penalty in the name of the alleviation of supposed unnecessary harshness. We have concluded that these cases rest on no firm precedence, that such alleged harshness is illusory, that there is no compelling independent reason to lessen the statutory penalty case by case and, therefore the language of Section 596 must be read as a mandatory command to the judiciary."

Inapplicable

In the cases which allowed tailoring, the shipowner claimed equitable relief from detriment caused by the seaman's delay in declaring or prosecuting his claim, conduct which interfered with the earlier settlement of the claim and the stopping of the penalty. The appellee seeks to show such a basis in the present case by pointing to the time which elapsed between the date wages were due (March 24, 1969) and the date that suit was filed (March 13, 1970) "approximately one year later."

The seaman is not required to know the statutes involved in order to be protected by them. The shipowner's paymaster is required to know them and comply with them. Any delay occasioned by the seaman's learning of the rights which he was denied, and in this case deceived about, does not call for an equitable adjustment in favor of the transgressing party. The seaman in this case did not learn what his rights were for several months.

The seaman is not obliged to teach the controlling law to the shipowner. Yet the record in this case shows the following.

1. The seaman demanded his wages and penalty due on September 10, 1969, and at the same time informed the shipowner's Claims Department what the law was, citing the relevant statutes correctly. He also offered to settle for $1,910.00, which was the wages held and one-half the penalty owing to him at that time. (Exhibit A.)

2. The shipowner, fully and correctly apprised of the law, refused this offer. (Exhibit B.)

3. On September 30, 1969, the seaman supplemented the information concerning the law by citing the *Isbrandtsen* case, and repeated the same offer to compromise. (Exhibit C.)

4. On October 24, 1969, the seaman received notice from the shipowner's lawyers that they were taking the claim in hand. (Exhibit D.)

5. On November 21, 1969, the seaman sent a reminder to the lawyers. (Exhibit E.)

6. On January 22, 1970, having had no acknowledgment from the shipowner's lawyers, the seaman wrote again to them and cited additional cases (including *Schwark)* and stated a new offer to compromise for $2,500.00. This letter gave thirty days for acceptance, to February 22, 1970. (Exhibit F.)

7. No answer was received and on March 13, 1970, the suit was filed, concluding six months of demands, teaching of law, and offers to compromise.

8. On January 5, 1971, the seaman brought a motion for summary judgment, again citing the law on which this case was decided by the Ninth Circuit. In this motion he pointed out:

"A motion for summary judgment is especially appropriate in the present case . . . (because) the penalty provided in Section 596 for unjustified withholding of wages is *cumulative* (citing *Isbrandtsen).* Therefore, early adjudication of any penalty dispute tends to prevent an extreme result."

The shipowner's reply was to file a counter-motion for summary judgment.

Finally, the shipowner was advised by its own counsel to settle this case for $3,500.00. It refused to accept this advice and ordered the case to be defended.

If the foregoing facts, involving teaching, diligence, and compromise by the seaman—and rejection of its own lawyers' advice by the shipowner—do not call for the full statutory award, even under the equitable doctrine of "tailoring," one can only wonder what more could be required for a seaman to receive this benefit.

Dated: May 20, 1974.

/s/ Eric J. Schmidt
Eric J. Schmidt
Counsel for Plaintiff

Exhibit A

September 10, 1969

American Foreign Steamship Corp'n.
80 Broad Street, New York, n.y. 10004

Re: Granville C. Matise—Withholding of wages
S.S. American Hawk : 3/19/69

Gentlemen:

The above-named American seaman was discharged from his employment on the American vessel "S.S. American Hawk" at the port of Saigon, S. Vietnam, on March 19, 1969.

Under the governing federal statutes he became entitled to the immediate payment of his earned wages at that time, with no right in the shipowner to delay. (46 U.S.C. sects. 682 et seq.)

Mr. Matise was not paid his wages until March 24, 1969, and at that time earned wages—not in dispute—in the amount of $510.00 were unlawfully withheld, purportedly to repay the shipowner its costs of repatriating said to the United States.

The law with respect to the withholding of seaman's wages has long been settled and clear. The Supreme Court of the United States has repeatly declared that the withholding of a seaman's wages can be permitted only in strict compliance with the relevant statutes (46 U.S.C. sects. 701 et seq.) and that even where a seaman admittedly owes money to the shipowner, payment cannot be enforced by withholding wages but must be effected in a

separate action. The justification for withholding wages is limited strictly to the grounds set forth in the statutes. The fact that the withholding in this case was declared to be for the purpose of paying an indebtedness belonging to the shipowner, merely makes the offense more serious.

Mr. Matise has employed this office to recover his wages and the penalty provided under Section 596 for wrongful withholding. We have agreed to do so, and accordingly demand said wages in the sum of $510.00 and the double-wage penalty under Section 596 for the 175 days which have elapsed since the wages became due. This amounts to $2,800.00.

We offer, in a spirit of compromise, to release all claims in return for the payment of one-half the penalty and the restoration of the wages involved—a sum of $1,910.00.

We request your early response.

Exhibit B

AMERICAN FOREIGN STEAMSHIP CORPORATION
Oversea Bulk Cargo Carriers
Steamship Owners and Operators
80 Broad Street
New York, N.Y. 10004

CABLE ADDRESS
AMSTEAM

TELEPHONE
DIGBY 4-7432

September 26, 1969

Eric J. Schmidt
Attorney at Law
556 Mills Tower
San Francisco, Calif. 94104

Re: Granville C. Matise
Ex-Oiler S.S. American Hawk

Dear Mr. Schmidt:

In response to your letter dated September 10, 1969 concerning the above referenced seaman, I am submitting copies of Official Loggings concerning said Oiler. Mr. Matise was logged on five separate occasions during his period of employment on the S.S. American Hawk.

The Master of the Vessel presented these facts to the U.S. Coast Guard at Saigon, upon the Ships arrival at that Port, whereby the Coast Guard ordered Mr. Matise removal from the Vessel. Special permission was granted the Master to break seal on the Ships safe, in order to purchase an Air Line Ticket, which had to be paid in dollars. No other monies were authorized to be withdrawn from the safe, since according to currency regulations at Saigon, it is against the law to bring U.S. currency ashore.

Mr. Matise was paid the balance of any earned wages due, upon his arrival back in the United States, by our Agents, J. H. Winchester & Co., Inc. in San Francisco, Calif., upon presenting himself at their office. The deduction of $510.00 to cover the cost of transporting Mr. Matise, was done with the full knowledge of Mr. Matise, as well as the U.S. Coast Guard and U.S. Consul at Saigon.

In view of the facts stated in this letter, we do not feel that Mr. Matise has any basis for a Monetary Claim against this Company.

Very truly yours,
AMERICAN FOREIGN STEAMSHIP CORPORATION
/s/ W. J. Geiger,
Paymaster

Exhibit C

September 30, 1969

American Foreign Steamship Corp'n.
80 Broad Street, New York, N.Y. 10004
Att: W. J. Geiger, Paymaster

Re: Granville C. Matise
S.S. American Hawk

Dear Mr. Geiger:

Your courteous and documented reply to the demand in this case has been received.

The fact is that Mr. Matise does not challenge the loggings or his discharge in Saigon. But the company's claim that a seaman discharged for cause in a foreign port can be forced to pay for his transportation home by a wage-withholding is the error we are dealing with. *It is settled law that the repatriation costs of a seaman, however separated from his vessel, cannot legally be deducted from his wages.* Even where the shipowner's right to reimbursement is undisputed he cannot withhold wages.

> ". . . only such deductions and setoffs for derelictions in the performance of his duties shall be allowed against his wages as recognized in the statutes. Other claims against him may be valid but their collection must be sought by other means."
>
> *Isbrandtsen Co. v. Johnson,* 72 S.Ct. 1011, 1017

The shipowner is held to a knowledge of the governing law in this respect. "Full knowledge" of the U.S. Coast Guard and Consul have no bearing.

We stand by the offer to compromise stated earlier.

ES/jfl

Exhibit D

(Letterhead of
Dougherty, Ryan, Mahoney, Pellegrino & Giuffra
Counsellors at Law
67 Wall Street
New York, N.Y. 10005)
October 24th, 1969

Eric J. Schmidt, Esq.
556 Mills Tower
San Francisco, California 94104

Re: SS "American Hawk"
Granville C. Matise
Our File No. 4133

Dear Mr. Schmidt:

The above matter has been referred to us by American Foreign Steamship Corporation. We are reviewing the file and will contact you to discuss the matter at the earliest opportunity.

Very truly yours,
Dougherty, Ryan, Mahoney, Pellegrino & Giuffra
By: L. Mahoney

LJM:mh
Airmail

Exhibit E

November 21, 1969

Dougherty, Ryan, Mahoney et al.
67 Wall Street
New York, N.Y. 10005

Attention: Mr. Lawrence Mahoney

Re: S.S. "American Hawk"
Granville C. Matise
Your file no. 4133

Dear Mr. Mahoney:

We are awaiting your response concerning the claim presented by the seaman named above.

Very truly yours,
Counsel for Claimant

ES/jfl

Exhibit F

January 22, 1970

Doughtery, Ryan, Mahoney, et al.
67 Wall Street
New York, N.Y. 10005

Attention: Mr. Lawrence Mahoney

Re: S.S. "American Hawk"
Granville C. Matise
Your file: no. 4133

Dear Mr. Mahoney:

Our offer to compromise this claim for the payment of $1,910.00 is hereby withdrawn. The double-wage penalty has been running steadily since your last sign of interest on October 24, 1969. If your firm handles seamen's cases, it must surely know that no wage forfeitures or withholdings are permissible for the purpose of reimbursing the shipowner for any contractual obligation owed by the seaman, even after that obligation has been reduced to judgment. In the present case, the basic right of the shipowner to be reimbursed is almost certainly non-existent, but that is not the point. Taking a seaman's wages for the purpose is illegal regardless of the validity of the obligation. I cite you to *Kontos,* 236 FS 664; *Swain,* 360 F2d 81; *Isbrandtsen v. Johnson,* 72 S.Ct. 1011, 343 U.S. 779; and for a case directly on point with Matise, *Schwark v. S.S. Rio Macareo,* 249 FS 375.

I spoke with my client this morning. We offer to settle this claim for the amount of $2,500.00. This offer will terminate in thirty days and suit will be filed.

Very truly yours,

PROOF OF SERVICE BY MAIL (C.C.P. 1013a, 015.5)

State of California

City and County of San Francisco
ss.

I am a citizen of the United States and a resident of the county of San Francisco.

I am over the age of eighteen years and not a party to the within above entitled action; my business address is: 528 Mills Tower, 220 Bush Street, San Francisco, CA 94104.

On May 20, 1974 I served the within Plaintiff-Appellant's Reply Memorandum.

On the opposing counsel in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office mail box at addressed as follows:

Graham & James
Attorneys at Law
310 Sansome Street
San Francisco, CA 94104

I, Betty M. Lundwall, certify (or declare), under penalty of perjury,* that the foregoing is true and correct.

Executed on May 20, 1974 at San Francisco, California.

/s/ Betty M. Lundwall
Betty M. Lundwall

*Proof of service by mail forms, being signed under penalty of perjury, do not require notarization.

In The United States District Court
For the Northern District of California

No. C-70 538 RHS

Lillian M. Matise, as personal representative of Granville C. Matise, deceased,
Plaintiff,

vs.

American Foreign Steamship Company, et al.,
Defendants.

[Filed June 13, 1974]

JUDGMENT ON MANDATE

Lillian M. Matise, as personal representative of Granville C. Matise, deceased, having appealed to the United States Court of Appeals for the Ninth Circuit from the judgment entered in this cause on the 15th day of December, 1971, and said Court having issued its Mandate dated the 9th day of April, 1974, wherein it was ordered, adjudged and decreed that such judgment be reversed, with costs assessed at $94.65 in favor of appellant;

Now upon the Mandate of the United States Court of Appeals for the Ninth Circuit, dated the 9th day of April, 1974,

It is Ordered, Adjudged and Decreed that the judgment of this Court entered December 15, 1971, be, and the same is hereby vacated and set aside; that the cause

be restored to the docket for further proceedings in accordance with such Mandate; and that, pursuant to said Mandate, judgment be entered that Lillian M. Matise, as personal representative of Granville C. Matise, deceased, have and recover from American Foreign Steamship Corporation the following sums:

1. $510.00 as wages wrongfully withheld, with interest thereon at seven percent (7%) from March 24, 1969 to December 15, 1971, amounting to $95.62, for a total sum of $605.62;

2. $29,462.00 as penalty wages for the wrongful withholding of earned wages from March 24, 1969 to December 15, 1971, with interest thereon at seven percent (7%) from December 15, 1971, to June 7, 1974, amounting to $5,106.00;

3. $94.65 as costs on appeal;

4. $37.00 as costs in this Court.

Dated: June 13, 1974.

Robert H. Schnacke
Judge of the United States District Court

United States Court of Appeals
For the Ninth Circuit

No. 74-2721

Lillian M. Matise, as personal representative of Granville C. Matise, deceased,
Plaintiff-Appellee,
vs.
American Foreign Steamship Company, et al.,
Defendant-Appellant.

[Filed Sept. 27, 1974]

ORDER

Before: DUNIWAY and ELY, Circuit Judges

The appellee has presented herein two motions, (1) to expedite the appeal, (2) to require the appellant to post an adequate supersedeas bond. The only issue presented by the appeal is apparently whether the District Court complied with this court's judgment in *Matise v. American Foreign Steamship Co.*, ... F.2d ..... (9th Cir. Mar. 8, 1974). The court is familiar with the record and has examined the District Court's judgment of June 13, 1974, the judgment challenged in the present appeal.

That judgment, in the court's opinion, conforms with the intention of this court, as expressed in its opinion of March 8, 1974. The subject appeal is therefore dismissed as frivolous.

Graham & James
One Maritime Plaza
San Francisco, California 94119
Telephone: 986-2171
Attorneys for Appellant
and Petitioner

In the
United States Court of Appeals
for the Ninth Circuit

No. 74-2721

Lillian M. Matise, as personal representative of Granville C. Matise, deceased,
Plaintiff-Appellee,
vs.
American Foreign Steamship Company, et al.,
Defendant-Appellant.

[Filed Oct. 11, 1974]

PETITION FOR A REHEARING IN BANC

Appeal from the United States District Court for the Northern District of California

Honorable Robert H. Schnacke, Trial Judge

Comes Now American Foreign Steamship Company, appellant-petitioner herein, and respectfully petitions this Court for a rehearing in banc of its order of dismissal filed September 27, 1974. As this Court is aware, the

above-entitled case is but one of many so-called double-wage penalty cases instituted by attorney Eric J. Schmidt in the United States District Court for the Northern District of California and brought before this Court on appeal. Although the other cases may be considered typical wage cases, the above-entitled matter is atypical in that this seaman received all funds to which he was entitled. This is not disputed and is the law of the case. Since all the double-wage cases, including this matter, have been submitted to panels of different judges, it is respectfully suggested that an in banc rehearing be held.

Wherefore, appellant respectfully requests that this Court order a rehearing in banc.

Respectfully submitted,
Graham & James
By /s/ John A. Flynn
John A. Flynn
Attorneys for Appellant-Petitioner

CERTIFICATE OF SERVICE

I, JOHN A. FLYNN, hereby certify that on the 11th day of October, 1974 I mailed two (2) true copies of the Appellant's Petition for a Rehearing in Banc to Eric J. Schmidt, Attorney for Appellee, 528 Mills Tower, 220 Bush Street, San Francisco, California.

/s/ John A. Flynn
John A. Flynn

United States Court of Appeals
for the Ninth Circuit

No. 74-2721

Lillian M. Matise, as personal representative of Granville C. Matise, deceased,
Appellee,
vs.
American Foreign Steamship Company, et al.,
Appellant.

[Filed Nov. 7, 1974]

ORDER

Before: DUNIWAY and ELY, Circuit Judges.

The motions panel concerned with the subject case (Duniway and Ely) has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

RECEIVED
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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-966

AMERICAN FOREIGN STEAMSHIP COMPANY, a corporation,

Petitioner,

vs.

LILLIAN M. MATISE, as personal representative of GRANVILLE C. MATISE, deceased,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

ERIC J. SCHMIDT
528 Mills Tower
220 Bush Street
San Francisco, California

Counsel for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. _____

AMERICAN FOREIGN STEAMSHIP COMPANY, a corporation,

Petitioner,

vs.

LILLIAN M. MATISE, as personal representative of GRANVILLE C. MATISE, deceased,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent LILLIAN M. MATISE is representing an estate which is devoid of funds. She asks leave to proceed in forma pauperis pursuant to Rule 53 and to file the attached Memorandum In Opposition to a Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in accordance therewith.

The respondent's affidavit in support of this

motion is attached hereto.

Respectfully submitted,

Eric J. Schmidt

ERIC J. SCHMIDT
Counsel for Respondent

DATED: February 13, 1975
at San Francisco, California

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No._____

AMERICAN FOREIGN STEAMSHIPS' COMPANY, a corporation

Petitioner

vs.

LILLIAN M. MATISE, as personal representative of GRANVILLE C. MATISE, deceased

Respondent

AFFIDAVIT

I, Lillian M. Matise, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. My name is Lillian M. Matise. I reside at Route 2, Box 106, Waldorf, Maryland.

2. On November 30, 1971, the Register of Wills for Charles County, State of Maryland, appointed me the Personal Representative of the Estate of Granville C. Matise, deceased, and I am presently serving in that capacity.

3. The estate of Granville C. Matise is unable to pay the costs of responding to the Petition for Certiorari in this case unless I am permitted to proceed in forma pauperis.

Lillian M. Matise
Lillian M. Matise

Duly witnessed and sworn to before me, a Notary Public, this 21st day of February, 1975.

Diane H. Wenbler
Notary Public

IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1974

NO.

AMERICAN FOREIGN STEAMSHIP COMPANY, a corporation,

Petitioner,

vs.

LILLIAN M. MATISE, as personal repaesentative of GRANVILLE C. MATISE, deceased,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

TOPICAL INDEX

	Page
Counter Statement of Issues Presented	1
Statement of the Case	1
Argument	2
I. The Concept of Tailoring is Illegal	3
II. The Attempt to Assert It Was Untimely	6
III. The Concept Has No Application to the Present Facts	8
Conclusion and Prayer	8

TABLE OF AUTHORITIES CITED

Cases — Page

Apex Liquors, Inc. v. Dist. of Columbia
5 FR Serv.2d 81, 303 F.2d 206
(App. D.C. 1962) 7
Forster v. Oro Navig. Co.
128 F.Supp. 113, Aff'd. 228 F.2d 319 (1955 . 4
Gerber v. Spencer
278 Fed. 886, 889 (9th Cir. 1922) 4
Mystic Steamship Co. v. Stromland
21 F.2d 607 (4th Cir.) 1927 3
Samad v. Etivebank
134 F.Supp. 530, 542 (E.D. Pa, 1955) 4
Southern Cross v. Firipis
285 F.2d 651 (4th Cir. 1960) 4

STATUTES

TIT 46 U.S.C.A., Section 596 1

TIT 28 U.S.C.A., Section 2201, 2202 5

RULES

F.R.C.P. Rule 57 5

F.R.C.P. Rule 8(c) 6

COUNTER STATEMENT OF THE ISSUES PRESENTED

1. Only one issue was presented to the Appellate Court below in the appeal from which this petition derives. That issue is not presented by this Petition for Certiorari.

2. None of the three issues recited by the petitioner in its Petition for Certiorari is properly before this Court.

3. The single question presented below was dismissed as being frivolous.

The sole question presented to the Ninth Circuit Court of Appeals was: Did the judgment on mandate which was made by the trial court below following decision of an earlier appeal conform to the Appellate Court's mandate?

STATEMENT OF THE CASE

The seaman Matise brought an action in the District Court to recover (1) wages which had been taken by the defendant shipowner to reimburse itself for the cost of transporting Matise home following a foreign discharge for cause; (2) the double-wage penalty provided by TIT 46 U.S.C.A., Section 596, for the "refusal or neglect" to pay wages when due.

The District Court denied his claim (App. to Pet. i.)

The Court of Appeals reversed, holding that the wage taking was illegal and was done without sufficient cause, subjecting the shipowner to the penalty (App. to Pet. iv.--xiii.). Matise v. American SS Co., No. 72-1345, 488 F.2d 469.

The shipowner's petition for a rehearing was denied. The time allowed the shipowner to apply for certiorari expired on

July 5, 1974, without any application having been made.

Pursuant to mandate, the trial court made its judgment awarding the seaman his wages and the double-wage penalty for the period of the wrongful withholding (App. to Pet. xv.).

The shipowner filed its Notice of Appeal from this judgment on July 15, 1974. This second appeal was docketed as American Foreign SS Co. v. Matise, No. 74-2721.

The only question presented was whether or not the trial court's judgment conformed to the Appellate Court's decision in No. 72-1345, which decision had not been challenged after the shipowner's petition for rehearing had been denied.

The Appellate Court recognized the limited nature of the second appeal (ORDER - filed September 27, 1974 - App. to Pet. xvii.), and dismissed it as frivolous. The Court in banc refused to rehear it (App. to Pet. xviii.). The present Petition for Certiorari is from the decision in the second appeal, American Foreign SS Co. v. Matise, No. 74-2721. It does not present for review by this Court those issues which were decided and left unchallenged in Matise v. American Foreign SS Co., No. 72-1345. The statement of issues in the Petition for Certiorari is completely erroneous. The only question which could properly be placed before this Court on this Petition for Certiorari is not even referred to.

ARGUMENT

The petitioner's principal complaint is that it was not permitted to advance and argue the defense of the "tailoring"

theory in the trial court following the issuance of mandate.

There are three separate reasons why this complaint is without merit.

I. The concept itself is illegal. It is a judge-created device which devitalizes the penalty provision which itself provides the only real incentive for shipowners to respect the statutes protecting seamen's wages. Under this "equitable" concept, the act of Congress in doubling the penalty in 1915 can be totally negated by any judge, who can give whatever portion of the older one-for-one penalty that he wishes.

The entire theory rests upon misconceptions which courts have been misled by shipowners' counsel into accepting.

The feeling has been assiduously cultivated that the wage penalty, if enforced in the clear terms in which it is stated by Congress, quickly becomes a kind of Frankenstein turned loose in the land, which somehow gets beyond human control and results in atrocious abuses. This view depends upon several completely erroneous beliefs.

a) That the shipowner is helpless to put a stop to the running of the penalty before the matter is adjudicated, which takes years.

This fallacy was given early expression in the 1927 case of Mystic Steamship Co. v. Stromland, 21 F.2d 607 (4th Circuit) and the two excerpts from that decision have become classic in briefs of shipowners' counsel:

"To deny the penalty during such delay is but a

reasonable application of the doctrine of laches."

"It was certainly not the intention of Congress that the statute would be construed in such a way as to virtually deny shipowners the right to contest liability in cases of this sort by making the penalty so great in case of failure to maintain the defense asserted as to deter them from making any defense at all."

FACT:

The penalty can be stopped at any time, unilaterally by the employer, by the simple act of depositing the disputed wages and penalty accrued to date with the Court.

Gerber v. Spencer, 278 Fed. 886,889 (9th Cir. 1922);

Forster v. Oro Naviq. Co., 128 F.Supp. 113, Aff'd. 228 F.2d 319 (1955);

Samad v. Etivebank, 134 F.Supp. 530, 542 (E.D. Pa, 1955)

Southern Cross v. Piripis, 285 F.2d 651 (4th Cir. 1960)

This costs nothing and creates no risk. The seaman gets nothing unless the Court awards it to him as the result of the trial. The shipowner recovers all of the money which it does not legally owe to the seaman. In some cases the deposit can be made on the day the dispute arises, in which case there will be no penalty. In all cases the deposit can be made at an early stage of the controversy, at a time when the penalty amounts to no more than reasonable compensation for a mistake and not a punitive levy.

b) A second related fallacy is that the seaman, by delaying filing his action, can run up an unconscionable penalty which the shipowner is helpless to prevent.

/////

FACT:

As either an addition or alternative to the deposit, the shipowner can procure a prompt judicial determination of the controversy merely by filing for a declaratory judgment. It does not have to await any act by the seaman. Under Rule 57, the Court may advance the matter on the calendar to provide a speedy hearing. The provisions of TIT 28, Sections 2201 and 2202, make this remedy admirably suited for the prompt disposition of penalty wage suits.

The helplessness of the shipowner to control the penalty provides the entire foundation for the leaning tower of authorities supporting the "tailoring" theory. When the simple facts remove this foundation, the tower is left suspended in error.

Why have these available remedies been ignored and loud wailing by shipowners against "unconscionable" acts of seamen been substituted for them? The answer might well lie in the hope of employers that if the penalty becomes large enough--when contrasted with the amount of wages involved--this fact will impel many courts to seek a way to avoid awarding any of it.

In truth, the amount of the penalty which accrues after the shipowner learns of the seaman's claim is a direct measure of the employer's contempt for the seamen's rights. The penalty grows only while the employer refuses to make the good faith showing which is a common requirement in other areas of the law, i.e., the deposit of disputed monies with a stakeholder to await a judicial determination. (In order for an escrow arrangement of this

kind to be effective, it is essential that all of the money to which a contending party could become entitled under the decision be placed on deposit. In penalty-wage claims this includes the penalty accrued to date as well as the net wages.)

II. The attempt to assert the defense was untimely.

In those circuits where it is permitted, the doctrine which allows cutting down the wage award to some fraction of the statutorily-computed amount ("tailoring") is based upon the defense of laches. It is grounded upon the alleged prejudice to the shipowner which results when a seaman delays filing his action.

Laches is an affirmative defense which must be pleaded. F.R.C.P. Rule 8(c):

> "(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award . . . laches . . . and any other matter constituting an avoidance or affirmative defense . . ."

The appellant pleaded the relief he was seeking specifically and plainly. He demanded the statutory amount in his Complaint.

> "Complaint, Paragraph XI:
>
> "By reason of the facts above set forth, the plaintiff was and is entitled to receive his withheld wages in the sum of $510.00 and two days' pay for each day that the defendant refused and neglected without sufficient cause to pay said wages." (Emphasis added.)

The appellant repeated his demand for the full and undiminished statutory penalty in his prayer. (Paragraph 4.)

In its answer to appellant's demand for the double-wage penalty, the appellee pleaded only denial.

> "Rule 8(c) requires the defense of laches to be made affirmatively in the district court, and Rule 12(b) requires that such an affirmative defense be made by a responsive pleading."
> Apex Liquors, Inc. v. District of Columbia, 5 FR Serv. 2d 81, 303 F.2d 206 (App.D.C. 1962)

At the trial, the appellee did not refer to the defense of laches or offer any evidence on the subject of limiting damages. Appellee did not seek to amend its answer to state any affirmative defense.

The trial was not bifurcated. The damage issue was tried, as well as the liability issue. Had the case been tried to a jury, the court would have been required to give BAJI Instruction No. 15.22 or its federal equivalent, FJPI 78.05.

The appellee simply did not assert the defense of laches or any other affirmative defense at the trial. That was its last opportunity under the rules to do so.

On appeal, the appellant stated the precise amount in dollars and cents of the damages he claimed. (Appellant's Opening Brief, p.2.). Neither in its brief nor in oral argument did the appellee make any reference to diminishing or limiting the damages.

Following judgment by the Ninth Circuit, the appellee filed a Petition for Rehearing in which it described those aspects of the law which it contended the Appellate Court had misjudged

or misapprehended. No reference was made to any theory for limiting the amount of damages.

Following denial of its first petition, the appellee filed a second, for a Rehearing In Banc, and for Recall of Mandate. In neither of these was the subject of limiting the amount of the damages referred to.

III. The "tailoring" concept would not apply to this case in any event.

Even if the tailoring concept were an established part of the applicable law, and even if the shipowner here had raised it in timely fashion,--still, the concept would have no application in the present case because the facts would not support it.

While it is not practicable to set forth the necessary facts in this memorandum, the record will clearly show that the seaman acted diligently at every stage of his claim and even tried to eliminate routine delay by bringing a motion for summary judgment long before the scheduled trial.

CONCLUSION AND PRAYER

Under this Court's rules, the present petitioner's right to seek certiorari is restricted to an issue which the petitioner has ignored. The issues described by the petitioner as viable have in fact all perished from the petitioner's inaction.

These facts make this present petition a sham.

These facts have been made known to petitioner.

To pursue certiorari in these circumstances constitutes

a misuse of this Court's process and an abuse of the respondent's time, energies and money.

Respondent respectfully requests this Court to dismiss the application herein and to award her counsel reasonable compensation for the expenses and delay caused by the petitioner's unjustified acts.

Dated: February 14, 1975.

Respectfully submitted,

Eric J. Schmidt

ERIC J. SCHMIDT
Counsel for Respondent

Supreme Court, U. S.
FILED
MAY 1 1975
MICHAEL RODAK, JR., CLERK

Supreme Court

[illegible] STATES

October Term, 1974

No. 74-[illegible]

[illegible] PETROLEUM COMPANY, a Corporation, *Petitioner*,

vs.

[illegible] M. MARTIN, as personal representative of [illegible] C. Martin, deceased, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONER

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Counsel for Petitioner

Subject Index

	Page
Opinions below	1
Jurisdiction	2
Statute involved	2
Questions presented	3
Statement of the case	3
Summary of argument	6
Argument	6
Conclusion	10

Table of Authorities Cited

Cases	Pages
Caribbean Federation Lines v. Dahl, 315 F. 2d 370 (5th Cir. 1973)	9
Casado v. Schooner Pilgrim, Inc., 171 F. Supp. 78 (D. Mass. 1959)	10
Collie v. Fergusson, 281 U.S. 51 (1930)	6, 7, 9
Escobar v. American Transportation Company, 503 F. 2d 271	5, 8
Forster v. Oro Navigation Co., 228 F. 2d 319 (2d Cir. 1955)	9
Isbrandtsen Co. v. Johnson, 343 U.S. 779 (1952)	6, 7
Mavromatis v. United Greek Shipowners Corp., 179 F. 2d 310 (1st Cir. 1950)	9
McConville v. Florida Towing Corp., 321 F. 2d 162 (5th Cir. 1963)	7
McCrea v. United States, 294 U.S. 23 (1935)	6, 7, 9
Mystic SS Co. v. Stromland, 21 F.2d 607 (4th Cir. 1927) cert. den. 276 U.S. 618	9
Prindis v. The SS African Pilgrim, 266 F. 2d 125 (4th Cir. 1959)	8, 9
Roeder v. Alcoa Steamship Co., 422 F. 2d 971 (3rd Cir. 1970)	7
Southern Cross SS Co. v. Firipis, 285 F. 2d 651 (4th Cir. 1960)	8
Swain v. Isthmian Lines, Inc., 360 F. 2d 81 (3rd Cir. 1966)	7, 8

Statutes	
28 U.S.C.:	
Section 1254(1)	2
46 U.S.C.:	
Section 596	2, 3, 4, 6, 9

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 74-966

AMERICAN FOREIGN STEAMSHIP COMPANY, a Corporation, *Petitioner*,

vs.

LILLIAN M. MATISE, as personal representative of GRANVILLE C. MATISE, deceased, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The initial opinion of the United States District Court for the Northern District of California, unreported, appears in the Appendix at pp. 7-9. The initial opinion of the United States Court of Appeals for the Ninth Circuit (App. pp. 10-18) is reported at 488 F.2d 471. The judgment of the United States District Court for the Northern District of California without opinion appears in the Appendix at pp. 46-47. The order and judgment of the United

States Court of Appeals for the Ninth Circuit, unreported and without opinion, appear in the Appendix at p. 48.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on September 27, 1974. (App. p. 48). A timely Petition for Rehearing En Banc was denied on November 7, 1974. (App. p. 51). A Petition for a Writ of Certiorari was filed February 4, 1975 and was granted March 17, 1975. The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

STATUTE INVOLVED

R.S. §4529, 46 U.S.C. §596 provides as follows:

"The Master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after termination of the agreement under which he was shipped, or at the time said seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within 24 hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every Master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two

days pay for each and every day during which payment is delayed beyond the respective periods, which sums shall be recoverable as wages in any claim made before the Court; but this section shall not apply to Masters or owners of any vessel the seamen of which are entitled to share in the profits of the cruise or voyage. This section shall not apply to fishing or whaling vessels or yachts."

QUESTIONS PRESENTED

1. Whether double-wage penalties (two days wages for each day of nonpayment) can be imposed under 46 U.S.C. §596 by the Court of Appeals without a trial or evidentiary hearing to permit a legal-factual determination whether the shipowner-employer acted with "sufficient cause" [the District Court having determined that the wages had been paid in full].

2. Whether the judiciary has discretion to assess the amount of a penalty under 46 U.S.C. §596 at something less than a mechanistic multiplication of the base wage by using the number of days of nonpayment (in this instance $29.58 times 996 days or $29,462.00) with no willfulness on the part of the employer or hardship to the seaman having been shown.

STATEMENT OF THE CASE

This suit was instituted by respondent's decedent (hereinafter "seaman" in the United States District Court for the Northern District of California against petitioner (hereinafter "shipowner") seeking (a) recovery of $510

alleged to have been illegally deducted by the shipowner from his earned wages, and (b) recovery under 46 U.S.C. §596 of a penalty of two days wages for each day wages are not paid in full. The basic facts, not in dispute, are as follows:

The seaman was employed as an oiler for a foreign voyage aboard the shipowner's vessel, the SS AMERICAN HAWK, and was discharged for good cause on March 19, 1969 in Saigon, South Vietnam due to his willful misconduct and neglect of duty. His discharge occurred in the presence of the vessel's Master, the United States Vice Consul and two United States Coast Guard officials. The vessel's Master was advised by the Vice Consul and Coast Guard officials that he was not obligated to pay the cost of the seaman's return transportation to the United States since the seamen had been discharged for good cause. Currency control regulations then prevailing in South Vietnam prohibited American merchant seamen from carrying United States currency ashore and required that the vessel's safe be sealed. An unsymmetrical fact of real life was that an airline ticket for return transportation to the United States from Saigon could at that time be purchased only with United States currency. It was therefore impossible to pay the seaman in full in U.S. dollars and enable him to himself buy his own airline ticket to return to the United States. However, to make possible the seaman's return by air to the United States with the approval of the Vice Consul, the vessel's Master was permitted by Customs authorities of South Vietnam to unseal the vessel's safe, withdraw $510 in United States currency and purchase the required airline ticket for the

seaman to return to the United States. On December 15, 1971 following trial to the District Court, judgment was entered in favor of the shipowner essentially on a finding that the seaman had been paid in full—no other issues were reached. (App. p. 9). The seaman appealed to the United States Court of Appeals for the Ninth Circuit which reversed the District Court's judgment. (App. p. 10). On remand to the District Court, judgment was entered in favor of respondent seaman in the sum of $35,306.27, the bulk of which amount represented the double-wage penalty from March 24, 1969 through December 15, 1971 (App. p. 47); the trial court construed the Court of Appeals' opinion as a pronouncement that the deduction was illegal and as a matter of law without sufficient cause and that the shipowner was therefore not entitled to a trial on the issue of sufficient cause. The trial court also follows its reading of the intervening opinion of the Court of Appeals for the Ninth Circuit in *Escobar v. American Transportation Company*, 503 F.2d 271 (9th Cir. 1974) [petition for certiorari now pending under docket no. 74-1184] in imposing the double-wage penalty mechanistically for the maximum period without consideration of circumstances. The shipowner appealed and on the seaman's motion for an expedited decision the Court of Appeals affirmed, describing the shipowner's appeal as "frivolous". (App. p. 48). The shipowner's request for a rehearing en banc, timely filed on October 11, 1974 (App. p. 49), was denied by the Court of Appeals on November 7, 1974 (App. p. 51).

SUMMARY OF ARGUMENT

The express language of 46 U.S.C. §596 and the decisions of this Court require an evidentiary hearing and a legal-factual determination that a refusal or neglect to pay was without sufficient cause in order to impose the penalty of two days wages for each day of elapsed time. The record is clear that the shipowner has not been permitted a trial on the question of sufficient cause. The double-wage penalty was imposed without any finding of arbitrary, unreasonable or willful conduct by the shipowner. The eventual determination of an improper deduction resulted in the mechanistic imposition of a penalty grossly disproportionate to the wages in dispute and without reflecting the equities supporting the shipowner's conduct (including the finding of the District Court on the first trial that the wages had been paid in full).

ARGUMENT

The Court of Appeals below treated the matter of "sufficient cause" as a question of law (apparently eliminated on a determination that a withholding from wages was technically improper) upon which the shipowner was not entitled to a trial on the merits. This is contrary to the express language of 46 U.S.C. §596 and the decisions of this Court in *Isbrandtsen Co. v. Johnson,* 343 U.S. 779 (1952); *Collie v. Fergusson,* 281 U.S. 51 (1930) and *McCrea v. United States,* 294 U.S. 23 (1935) all of which establish that liability for double-wage accrues, if at all, only upon a finding that a refusal or neglect to pay earned wages in a timely fashion was without sufficient

cause. This determination requires a legal-factual finding in consideration of all the evidence submitted. *McCrea v. United States,* 294 U.S. at p. 29; *McConville v. Florida Towing Corp.,* 321 F.2d 162, 168 (5th Cir. 1963), *Roeder v. Alcoa Steamship Co.,* 422 F.2d 971 (3d Cir. 1970). Liability for the double-wage penalty is not imposed without regard to fault of the shipowner. *Collie v. Fergusson,* 281 U.S. at p. 65. A finding of an unlawful withholding does not, in and of itself, establish the absence of sufficient cause for that withholding. *Isbrandtsen Co. v. Johnson,* 190 F.2d 991, 993 (3d Cir. 1952) affirmed 343 U.S. 779 (1952) and *Swain v. Isthmian Lines, Inc.,* 360 F.2d 81, 83 (3d Cir. 1966). The Trial Court never ruled on the propriety of the penalty or the question of sufficient cause for the shipowner's delay since it found no illegal withholding. (App. p. 9). The opinion of the Court of Appeals for the Ninth Circuit ignores the additional and separate legal-factual determination required for double-wage liability.

In addition to depriving the shipowner of a trial on the issue of "sufficient cause", no finding was ever made that the conduct was arbitrary or unreasonable. Liability for double-wages cannot be imposed where the refusal or neglect to pay was in some reasonable degree morally justified. *Collie v. Fergusson,* 281 U.S. 51, 56 (1930). Sufficient cause does not require a valid legal defense to the claim for wages since otherwise the phrase would be meaningless. Liability for the penalty provision of the statute requires a finding of some moral culpability of the shipowner. The record reveals the clear absence of any such finding in the proceedings below. On the contrary,

it is respectfully submitted that the record evidences the good faith, responsible and justifiable conduct of the shipowner in relying upon the instructions of the U.S. Vice Consul and Coast Guard officials in discharging the seaman and arranging for his repatriation. It is undisputed and confirmed by the Court of Appeals that the shipowner was as a matter of law not responsible for bearing the expense of the seaman's return transportation (App. p. 13); the penalty, greater than most criminal fines was, incredibly, triggered on the shipowner's undertaking to arrange transportation for the benefit of the seaman under unique circumstances precluding a cash payment to the seaman (App. pp. 11-12).

The mandate of the Court below as to the amount of the penalty represents an adoption of the views of the Court of Appeals for the Third Circuit in *Swain v. Isthmian Lines, Inc.*, 360 F.2d 81 (3d Cir. 1966).[1] See *Escobar v. American Transportation Company*, 503 F.2d 271 (9th Cir. 1974) [cert. pending under docket no. 74-1184]. A penalty in a sum grossly disproportionate to the deduction from wages was mechanically imposed. Other Courts of Appeals have expressly held that in assessing the amount of a Section 596 penalty the judiciary is vested with an inherent discretion to adjust the amount of the penalty to conform to the equities of the particular case. *Southern Cross SS Co. v. Firipis*, 285 F.2d 651 (4th Cir. (1960); *Prindis v. The SS AFRICAN PILGRIM*, 266 F.2d

[1]In denying any discretion to the Trial Court to adjust the penalty, the Court in *Swain* held that consideration of the equities supporting the shipowner were only proper in determining "sufficient cause". 360 F.2d at p. 87. In the instant case the Court of Appeals below did not even consider such equities in ruling on sufficient cause.

125 (4th Cir. 1959); *Mystic SS Co. v. Stromland*, 21 F.2d 607 (4th Cir. 1927) cert. den. 276 U.S. 618; *Mavromatis v. United Greek Shipowners Corp.*, 179 F.2d 310 (1st Cir. 1950); *Caribbean Federation Lines v. Dahl*, 315 F.2d 370 (5th Cir. 1973) and *Forster v. Oro Navigation Co.*, 228 F.2d 319 (2d Cir. 1955), affirming 128 F. Supp. 113 (S.D. N.Y. 1954).

Discretion to adjust the amount of a Section 596 penalty is consistent with and supportive of the earlier decisions of this Court in *Collie v. Fergusson*, supra, and *McCrea v. United States*, supra, setting forth the standards of reasonableness under which liability for double-wages would be imposed. The discretionary adjustment of the penalty to an amount which would reflect an equitable evaluation of the shipowner's conduct will promote the legislative policy of the statute intended to preclude an overreaching of the seaman and similarly prevent use of the statute by the seaman to obtain a windfall in a potentially unconscionable amount at the expense of the shipowner. Although the purpose of the statute certainly is not to encourage shipowners to contest wage claims, a violation of fundamental justice and due process occurs when, as in this case, penalties are mechanistically imposed by a Court of Appeals against a shipowner who successfully defends a wage claim in the District Court on the good faith belief, confirmed by the District Court's findings, that all sums owing to the seaman have been paid. To hold that §596 presents a mandatory command to the judiciary to impose the double-wage penalty in its full amount allows seamen to catch at penalties in an unconscionable amount when, as in this case, he received all sums

to which he was legally entitled. As stated by Judge Aldrich in *Casado v. Schooner Pilgrim, Inc.*, 171 F. Supp. 78, 80 (D. Mass. 1959) ". . . I do not believe that to say seamen are the favorites of admiralty should be to create a corresponding class of villains [i.e. shipowners] on whom to impose a new type of liability."

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Court of Appeals below should be reversed.

Respectfully submitted,

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Dated: April 29, 1975.

Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-966

AMERICAN FOREIGN STEAMSHIP COMPANY,
a Corporation,

Petitioner,

v.

LILLIAN M. MATISE, as personal representative
of GRANVILLE C. MATISE, deceased,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
ARGUMENT	5
First Question – Sufficient Cause	5
Second Question – "Tailoring"	9
CONCLUSION	12

TABLE OF AUTHORITIES

Cases:

Collie v. Fergusson, 281 U.S. 55 (1930) 6,7

Dahl v. SS Amigo, 202 F.Supp. 890 (S.D. Ala. 1962) 10

Escobar v. SS Washington Trader, 503 F.2d 271 (9th Cir. 1974) 5,10

Gerber v. Spencer, 278 F. 886 (9th Cir. 1922) 10,13

Swain v. Isthmian Lines, Inc., 360 F.2d 81 (3rd Cir. 1966) 10,11-12

Statutes:

TIT. 46 U.S.C., Section 596 ..... *passim*

Rules:

F.R.C.P., Section 2201 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-966

AMERICAN FOREIGN STEAMSHIP COMPANY,
a Corporation,

Petitioner,

v.

LILLIAN M. MATISE, as personal representative
of GRANVILLE C. MATISE, deceased,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

1. Did the Court of Appeal, with the record which was before it, properly rule that the illegal withholding of wages which it found to have occurred in the present case was done without sufficient cause to avoid the TIT. 46 U.S.C., Section 596 penalty?

2. After it has been judicially determined that wages were withheld in violation of law and that the double-wage penalty of Section 596 is applicable, do trial judges have the power, case by case, to reduce the penalty which the statute prescribes for such withholding?

STATEMENT OF THE CASE

The seaman respondent neglected his duties as a crewmember in the petitioner's vessel. As punishment he was fined $114.75 of his earned wages which the employer legally retains for its own purposes today. (Wage Voucher, App. p.5) Respondent was then involuntarily terminated in Saigon. The wages remaining to him after all legal withholdings, including the aforesaid fines, had been deducted, amounted to $628.45. The respondent has never challenged the master's right either to assess the aforesaid fines or to fire him and he admitted the legality of both those acts in his Complaint.

It is indisputable that at all times relevant to this action, the vessel owed a legal duty to the Government of South Vietnam to remove from that jurisdiction all persons it had brought there. This duty of removal applied to all passengers, all crewmembers, and even stowaways. It applied to the respondent. The duty was inescapable and it was enforceable by penalties of considerable severity. As a practical matter, the duty required the *repatriation* of all persons brought there who were not carried out again by the vessel, for the reason that the immigration departments

of all governments impose the same obligations and merely shifting a United States alien from one foreign jurisdiction to another would accomplish nothing.

The vessel satisfied the foregoing requirement, insofar as the respondent was concerned, by having the respondent flown back to the United States.

When the shipowner paid the respondent his earned wages in San Francisco, it deducted from those wages the amount of $510.00. This was stated to be for the purpose of recouping the money it had spent to transport the respondent from Saigon to the United States. (Wage Voucher, App. p.5.)

The seaman did not learn of the illegal nature of this wage deduction for several months. He then employed present counsel, who promptly sent a written demand to the shipowner for the wages taken and for the double-wage penalty which had accrued to date. The accrued penalty at that time was $2,800.00 and the seaman offered to settle for half of it and his wages, a total sum of $1,910.00. (App. EX. A.)

This offer was rejected by the shipowner in a letter which seemed to indicate confusion concerning the law. (App. EX. B.) The seaman's counsel replied promptly, citing the leading Supreme Court case on wage withholding, and reaffirming the offer to settle for half the penalty. (App. EX. C.)

Three weeks later a lawyer in a New York firm wrote to seaman's counsel stating that he would be in contact after reviewing the file. (App. EX. D.) This was the last communication ever sent by the shipowner or its counsel until after suit had been filed.

One month later, when no contact had occurred, the seaman sent a reminder. (App. EX. E.)

After two more months of inaction by the shipowner, seaman's counsel sent an offer to settle all claims for $2,500.00. At this time the accrued penalty was $8,337.00. A period of 30 days was given in which to reply. (App. Ex. F.)

No response to this letter was ever received and after waiting several weeks past the prescribed time, the seaman filed suit on March 13, 1970, for $510.00 of his earned wages and the waiting-time penalty provided in *Section 596.*

At the trial it was held that the purchase of the ticket by the shipowner for the purpose of transporting the seaman from Saigon to the United States constituted payment of wages to the seaman. (App. p.9) The seaman's claims were dismissed.

The Ninth Circuit ruled that the deduction for repatriation expenses was not one of those permitted by the statutes and was therefore illegal. It ruled further that the deduction was without sufficient cause and that the double-wage penalty applied. The case was remanded for entry of judgment.

Back in the lower court, the seaman sought judgment for his wages and the penalty which had accrued to the date of the trial court's first decree. At this stage of the proceedings, the shipowner introduced for the first time the argument that the penalty should be "tailored," i.e., cut down by the trial judge to whatever amount accorded with his view of the equities.

The seaman contended that the issue was untimely, that there was no authority for "tailoring" in the Ninth Circuit, and that even in jurisdictions where it was permitted, the defense had to be raised in the answer and any evidence offered in support of it had to be

presented at the trial–not at a new trial following remand for judgment.

While that question was pending, the Court of Appeal handed down its opinion in *Escobar v. SS Washington Trader,* 503 F.2d 271 (9th Cir. 1974), in which it decisively rejected the "tailoring" theory for the Ninth Circuit and declared that the penalty is to be computed as prescribed by the statute, without reduction.

The trial court thereupon entered judgment for the wages, costs in both courts, and the statutory amount of the penalty. (App. p.46.)

The shipowner's appeal from that judgment was dismissed as frivolous by the Ninth Circuit. (App. p.48.) The petition to this Court followed.

ARGUMENT

First Question: Sufficient Cause

Section 596 provides that the double-wage penalty applies when the master or owner "refuses or neglects to make payment" within the time prescribed by statute "without sufficient cause."

It is important to note at the outset that the penalty for failure or refusal to make payment can result from two distinct and separate causes:

(a) From *delay only*–where no deduction is made–and the shipowner asserts no right to the seaman's wages.

(b) From *effecting an illegal deduction*–usually based on a claim of contract, equity, or discipline; in

this situation the shipowner claims title to the wages in question and refuses to pay them over to the seaman on that ground.

1. If the withholding is one that is permitted by law, that fact obviously constitutes sufficient cause for making it.

2. If the withholding is one based solely upon delay, the question of sufficient cause for the delay can properly be considered. *Collie v. Fergusson*, 281 U.S.52 (1930).

3. If the withholding results from a deduction forbidden by law–*that fact alone establishes the absence of sufficient cause for making it.* The controlling law is simple, concise, clear and unchanging. There is no excuse for violating it.

It would seem that this simple and sensible rule should be allowed to operate. It would surely come close to effectuating the Congressional intent underlying the law. However, over the years, it has been smothered under a vast mass of argument by shipowners' counsel, all seeking to establish "sufficient causes" for having illegally taken and retained seamen's wages.

The impetus for this rampant obfuscation is, of course, to avoid the penalty, but the inspiration for it derives from a single decision. In 1930 this Court handed down its decision in *Collie v. Fergusson, supra*. In that case the shipowner had failed to pay wages in timely fashion because it was insolvent and performance was impossible. The only factor involved was delay. However, the language used in that decision to excuse impossibility of performance has been recited countless times since then in attempts to justify a sweeping,

indiscriminate assortment of unconscionable wage seizures.

Ever since *Collie* (*supra*), the trend on the part of the courts when the *Section 596* penalty is sought, has been to recognize two separate factors, *illegality* and *absence of sufficient cause*. There has been no attempt to distinguish between illegality stemming from mere delay, and that resulting from illegally asserted claims of title to wages.

The opinion of the Ninth Circuit (App. p.10 et seq) discloses that the Court employed the usual reasoning outlined above and dealt separately with the two questions. (App. p.13, top.) The Court first established that the taking of wages in the present case resulted from a deduction that was illegal. (App. p.16.)

It then proceeded to decide the question of sufficient cause.

It is obvious from the record on appeal that the defendant exerted itself to place before the trial court every fact and argument which tended to justify its conduct. The wage retention was argued both as being *within the statutes* (an advance; actual payment "in kind") and also as being *justified* by exigencies beyond the control of the vessel and its owners–*sufficient cause*. To support its claim of sufficient cause, the shipowner presented arguments that the seaman consented to the taking; that the U.S. Coast Guard had authorized it; that the Vice Consul had approved it; that the ship had no alternatives to choose from and was compelled to withhold the wages; that foreign law (currency regulations) required, and thereby justified, the act; that the seaman had signed a release of his claims and this provided the necessary justification; and

numerous other arguments directed to showing that sufficient cause existed, even though the taking might be illegal. These were all before the Appellate Court to weigh and judge.

In addition to knowing the reasons relied on by the shipowner to support its claims of "sufficient cause," the Appellate Court knew precisely what the cause for the taking really was! The vessel's Wage Voucher declared it precisely.

It was clear from the record that none of the tangled and confusing facts concerning local conditions in Saigon had any actual relationship to the wage-withholding in question. The vessel did not pretend that it had paid the seaman off in Saigon. It admitted, and its Pay Voucher showed, that Matise was paid off in San Francisco, and *at that time*, the company withheld from his wages an amount equal to that which the master had earlier taken from the vessel's safe and paid to an airline in Saigon.[1]

---

[1] That the entire Saigon episode was merely diverting window-dressing dreamed up in an attempt to show sufficient cause for the deduction is quite apparent. This Court can take judicial notice of the following facts: Saigon, at the time of this occurrence, was one of the busiest ports in the world for U.S. shipping. Hundreds of U.S. vessels and thousands of seamen visited there; of necessity, many were left behind for medical care and repatriation. Literally thousands of civilian workers for construction companies, government agencies, and the armed forces were living there, and some were daily using the airlines to arrive and depart. If Matise had fallen ill or suffered a serious accident, the vessel's duty to repatriate him could not have been questioned. That his repatriation could and would have been accomplished in a completely routine manner is hardly to be doubted.

The deduction in this instance was a clear case of recouping from a seaman's wages an expenditure which the vessel had made five days earlier in Saigon (which it claimed to be for the seaman's benefit, but which actually served the vessel's).

This kind of recouping is one of the precise abuses which the statutes were intended to prevent. It denies basic due process. The seaman had a right to be heard in defense of his wages. The taking was exactly the same as occurred under the general maritime law. The Appellate Court had full knowledge that the withholding violated the statutes and was "insufficient" in terms of *Section 596*. Its decision on this issue is reasoned and clear, supported by two independently-sufficient grounds.

Second Question: Judicial Modification of the Statutory Penalty – "Tailoring"

Since 1927 and probably earlier, a practice has developed among some courts to cut down the double-wage award from the amount which the statute prescribes. When this is done, it is always in the name of equity, on the ground that the seaman delayed in the adjudication of his claim and, by exercise of bad faith, caused the penalty to build up to an amount which the shipowner, even when found liable for the penalty, should not have to pay in full. The doctrine has been labelled "tailoring."

A conflict has developed between the circuits concerning the validity of this doctrine and some have refused to recognize it. An opinion which applies the

doctrine is *Dahl v. The SS Amigo*, 202 F.Supp. 890, 894 (S.D. Ala. 1962).

A thoroughly-reasoned opinion rejecting the doctrine is *Swain v. Isthmian Lines, Inc.*, 360 F.2d 81 (1966).

The Ninth Circuit, in *Escobar v. SS Washington Trader*, 503 F.2d 271 (9th Cir. 1974) has decisively rejected it.

The Tailoring Doctrine is Invalid

The tailoring doctrine is based entirely upon the belief that the seaman, by his delay, can control the amount of the penalty. That this belief is completely false is shown below.

Shipowner Can Deposit Wages with Court

In 1922 the Ninth Circuit declared a rule of law which has been adopted in other circuits and which has apparently never been even criticized unfavorably.

This rule declares that *payment by the shipowner of the net wages claimed and the penalty accrued to date of payment will stop the running of the penalty*. The rule is stated in *Gerber v. Spencer*, 287 F. 886 (9th Cir. 1922). This has been the law since at least 1922 and is the law today.

It is also established law that a shipowner can pay the contested wages, including the penalty wages, into the court's registry instead of delivering them to the seaman, with the same effect.

It thus becomes crystal clear that *a shipowner can stop the penalty at any time that it chooses to do so!* The seaman is totally unable to keep the penalty running if the shipowner merely deposits the disputed wages. *The shipowner can make the deposit without risking any loss*–since the court will return to it all monies which have not been judicially determined to belong to the seaman. After an employer has deposited the wages and penalty, it can thereafter disregard the diligence or lack of it with which the seaman prosecutes his claim.

The entire body of opinion in support of the "tailoring" theory is founded on a misconception of the law.

Shipowner Can Seek Declaratory Judgment

In addition to the simple, inexpensive and complete remedy described above, another one lies ready for the shipowners' use. It has merely to seek a *declaratory judgment* establishing its rights in the matter. (FRCP, Section 2201.) By this means it can limit the penalty to the first few weeks of the dispute.

There is nothing which prevents the employer from using both remedies–thereby stopping the penalty at the outset and having the dispute adjudged shortly thereafter.

There is no basis in fact, law, or equity that justifies interference with the Congressional intent expressed in Section 596. As the Court stated in *Swain (supra)*:

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There is no basis in fact, law, or equity that justifies interference with the Congressional intent expressed in Section 596. As the Court stated in *Swain (supra)*:

> "After all, if sufficient cause for the deduction is found to be lacking, the shipowner or his agent has either been overtly culpable in reducing a seaman's wages, or significantly inattentive in his duties vis-a-vis the seaman's wage rights. As we view it, it is precisely the possibility that large penalties will accrue that should motivate a shipowner to exercise care in computing wages due a seaman. We think that this deterrent was what Congress had in mind in providing for a penalty in the form of inflexible liquidated damages."

There is nothing more to be said on this important question. The law is settled and clear. The disregard for it which underlies the entire concept of tailoring is as incredible as the lack of perception in the fable of "The Emperor's Clothes."

CONCLUSION

The general maritime law permitted a ship's master to assert claims against wages, decide them unilaterally, and enforce them against wages in his trust. The victim of a wrongful taking had the burden of seeking his remedy in the courts. In the circumstances that prevailed, masters were practically unrestrained.

Congress enacted statutes which were intended to end these abuses. They listed the only offenses and the only contract-based claims for which wages could be taken. All other misdeeds required some other form of punishment. All other claims were required to be adjudicated where the seaman could be heard and even if he lost, his wages could not be reached.

After the statutes had been enacted, many masters continued to withhold wages just as they had before. But a seaman could now bring suit to enforce his statutory right to be paid his full wages. The validity of the claims for which the wages had been taken was irrelevant.

Seamen's suits for withheld wages were made economically possible by the penalty created by *Section 596*. However, recovery of wages and the waiting-time penalty was difficult. Only one seaman's suit succeeded on the Pacific Coast during the last century. (*Gerber v. Spencer, supra.*)

Shipowners' counsel successfully complicated what was intended to be a simple and summary seamen's remedy to the point that made its use an unappealing, risky venture.

Legality and *sufficient cause* were developed into troublesome areas of proof that cast a pall of uncertainty over the entire process and made litigation costly and long.

The Supreme Court in *Isbrandtsen Co. v. Johnson*, 343 U.S. 779 (1952) cut through the legality question and made its determination simple and clear. If the deduction involved was not listed, it was not legal.

This improvement still left the *sufficient cause* question as uncertain and troublesome as it had been before. Shipowners succeeded in having the issue declared to be one of fact to be decided by a jury. (*Lewis v. Hudson Waterways*, 495 F.2d 604 (2nd Cir. 1974)). A seaman still finds the intended benefits of the protective statutes to be almost illusory.

It is respectfully suggested that clarification by this Court, at this time, of the *sufficient cause* issue will go far to make the Congressional remedy for illegal seizure of seamen's wages a practical one.

Where the failure or refusal to pay wages is shown to be the result of a taking by the shipowner, with claim of title in itself, proof that said taking was illegal should be taken as proof of lack of sufficient cause. Unquestionably, a taking of funds by a trustee, in a manner which violated both statutory and constitutional rights of its employee, is "in some sense arbitrary or willful."

Respectfully submitted,

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 74-966

AMERICAN FOREIGN STEAMSHIP COMPANY, a Corporation,
Petitioner,

vs.

LILLIAN M. MATISE, as personal representative of
GRANVILLE C. MATISE, deceased,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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Subject Index

	Page
Statement of the case	1
Argument	2
I. An improper deduction or withholding from wages does not alone establish the absence of sufficient cause within the meaning of Title 46 U.S.C. Section 596	2
II. An unconscionable award to a seaman (without any willfulness of the shipowner having been shown) can only be avoided by the judiciary's exercise of discretion	3
Conclusion	5

Table of Authorities Cited

Cases

	Pages
Collie v. Fergusson (1930) 281 U.S. 52	2, 3
Escobar v. American Transportation Co., 503 F.2d 271 (9th Cir., 1974)	3
Guaranty Trust Co. v. United States (1938) 304 U.S. 126	5
Isbrandtsen Co. v. Johnson, 190 F.2d 991 (3d Cir., 1952) affirmed 343 U.S. 779 (1952)	3
McAllister v. United States (1954) 348 U.S. 19	2
McCrea v. United States (1936) 294 U.S. 23	3
Mystic SS Co. v. Stromland, 21 F.2d 607 (4th Cir., 1927)	5
Pacific Mail SS Co. v. Schmidt (1916) 241 U.S. 245	5
Swain v. Isthmian Lines, Inc., 360 F.2d 81 (3d Cir., 1966)	3
United States v. Elgin J. & E. R. Co. (1936) 298 U.S. 492	5

Statutes

46 U.S.C. Section 596 ..... 2, 3, 4

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REPLY BRIEF FOR PETITIONER

STATEMENT OF THE CASE

Petitioner, regretfully, must demur to the excessive number of statements in Respondent's Brief which are beyond or outside the record (a number which is not explainable by zeal or accident) compounded by the inclusion in the Appendix, against Petitioner's protest, of the material at Appendix pages 37 through 45, which is not evidence of record.

ARGUMENT

I. AN IMPROPER DEDUCTION OR WITHHOLDING FROM WAGES DOES NOT ALONE ESTABLISH THE ABSENCE OF SUFFICIENT CAUSE WITHIN THE MEANING OF TITLE 46 USC § 596.

Respondent's brief erroneously argues that "if the withholding results from a deduction forbidden by law—that fact *alone establishes the absence of sufficient cause for making it.*" (Respondent's Brief in Opposition p. 6). This argument is contrary to the express language of the statute and of this Court's decisions.

Respondent would have this Court delete from the statute the phrase "without sufficient cause", in all cases where there is a partial non-payment of wages. In order to de-emphasize the direct conflict with this Court's decisions, Respondent urges the (specious) ground of distinction that the shipowner acting reasonably and in good faith is protected against the penalty by the "without sufficient cause" wording in a case of total non-payment of wages, but not in a case of only partial non-payment. It is true that if everything has been done precisely as it is finally determined the law requires, as in this case the shipowner and the trial court in the first instance concluded and found—a finding certainly not clearly erroneous within the rule of *McAllister v. United States* (1954) 348 U.S. 19—the question of "sufficient cause" is not reached. (App.p.9).

This Court has previously rejected the basic contention put forward by Respondent in *Collie v. Fergusson* (1930) 281 U.S. 52, 55 in which this Court held and stated:

> "The phrase 'without sufficient cause' must be taken to embrace something more than valid defenses to the claim for wages. Otherwise it would have added nothing to the statute . . . The words connote either conduct which is in some sense arbitrary or willful, or at least a failure not attributable to impossibility of payment."

Respondent's suggestion that the rule of *Collie* is to be distinguished because that case involved total, not partial, non-payment is not to be taken seriously. The technical determination of the propriety of a deduction from wages, or of an attempt to pay wages in the unusual circumstances of this case, does not, in and of itself, establish the absence of sufficient cause for what is ultimately determined to be a non-payment. See *Isbrandtsen Co. v. Johnson,* 190 F.2d 991, 993 (3rd Cir. 1952) affirmed 343 U.S. 779 (1952); *Swain v. Isthmian Lines, Inc.* 360 F.2d 81 (3rd Cir. 1966); *McCrea v. United States* (1936) 294 U.S. 23, and *Escobar v. American Transportation Co.,* 503 F.2d 271 (9th Cir. 1974) [Petition for Certiorari now pending under Docket No. 74-1184]. It is respectfully submitted that Respondent's argument is erroneous and untenable.

II. AN UNCONSCIONABLE AWARD TO A SEAMAN (WITHOUT ANY WILLFULNESS OF THE SHIPOWNER HAVING BEEN SHOWN) CAN ONLY BE AVOIDED BY THE JUDICIARY'S EXERCISE OF DISCRETION.

Respondent's suggestion that a shipowner, faced with a claim arising under section 596, seek declaratory relief, although novel, is wholly without statutory or decisional support.

It is uncertain whether Respondent suggests that shipowners institute a declaratory relief action in connection with every sign off by seamen from shipping articles, and in any event the suggestion would duplicate in function the protection provided seamen by the comprehensive provisions of the Seamen's Relief Act, of which 46 U.S.C. §596 is included, for the active participation of impartial governmental officials (Shipping Commissioners in the United States and Consular officers abroad) at every stage of a seaman signing on articles and being paid off, with all of which Petitioner complied fully.

Respondent's other suggestions, that the shipowner either pay the disputed amount or make a deposit into court are equally ineffective as acceptable solutions to the problem which one aspect of this case presents in its classic form, namely, the unconscionable result of permitting penalties to accrue, day-by-day, as sought by Respondent, during periods which might be very extended but not bar an action on the ground of laches. It is admitted (p. 3 of Brief for Respondent) that the seaman was not aware that there was a legal basis for seeking recovery (double payment) of the $510.00 advanced in Saigon, and the possibility of penalty, "for several months". Thus, it is Respondent's position, with which the Court of Appeals below agrees, that Respondent should recover the double wage penalty for each of the 175 days which elapsed between March 24, 1969 until counsel's letter to the shipowner of September 10, 1969, a period during which both the shipowner and the seaman thought everything had been done properly. In such circumstances, there is nothing, even under Respondent's

suggestions, which an American shipowner could do to protect itself, and it is obvious that the permitting of two-for-one penalties to accrue during such a period with the resulting windfall bonanza to the occasional seaman exacted from the remnants of the American Merchant Marine serves no purpose of the statute or of public policy.

It is submitted that the mechanistic result sought by Respondent is irrational, is not required by the words of the statute and the absurd consequences urged by Respondent should not be read into it (*Guaranty Trust Co. v. United States* (1938) 304 U.S. 126), particularly where the Congress for over a period of 59 years has done nothing to set aside the "rule of reason" which this Court established in *Pacific Mail SS Co. v. Schmidt* (1916) 241 U.S. 245 (this is a "deduction case" within Respondent's terms of reference) and was followed by the lower courts [cf. *Mystic S.S. Co. v. Stromland,* 21 F.2d 607 (4th Cir., 1927)] until a few recent aberrant cases, of which the present case is an example. See *United States v. Elgin J. & E.R. Co.* (1936) 298 U.S. 492.

CONCLUSION

If the Court does not grant Petitioner's prayer for an outright reversal ordering that judgment be entered in its favor, it is respectfully submitted that the judgment of the Court of Appeals below should be reversed with instructions to remand the case to the Trial Court to determine whether the failure to pay $510.00 which was

advanced to the seaman for air transportation was without sufficient cause and if it is found that it was, the period of time, if any, during which the penalty should be deemed to have accrued.

Respectfully submitted,

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Date: October 6, 1975